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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958 1959

No. 263 2

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS
"MARK" AND ALSO KNOWN AS MARTIN COL-
LINS AND EMIL R. GOLDFUS, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 8, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

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United States District Court

EASTERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

v.

RUDOLF IVANOVICH ABEL, also known
as "Mark" and also known as Mar-
tin Collins and Emil R. Goldfus.

No. 45094.

Docket Entries.

(A)

1957

- Aug. 7 Indictment Filed.
- Aug. 7 Before Abruzzo, J. Bench Warrant Ordered.
Warrant Issued.
- Aug. 5 Letters of Authorization Filed (4).
- Aug. 7 By Bruckhausen Order for Sealing of Search
Warrant & by Abruzzo J. Order for Opening of
Search Warrant, Affidavits & Exhibits Filed.
- Aug. 9 Before Abruzzo, J. Deft. Present and Arraigned
Court Enters a Plea of Not Guilty for Deft.
Case adj to Aug 13, at 12 Noon Deft. Committed
Without Bail.
Order of Removal from Southern District of
Texas Filed.
- Aug. 12 Waiver of removal hearing filed.
- Aug. 13 Before Abruzzo, J. Deft Present adj to Aug. 16
11 A. M.
- Aug. 16 Before Abruzzo, J. Deft Present Upon request
of the Deft. the Court will assign the Deft.
an Attorney. Case (B) adjd to Sept. 16/57.

Docket Entries.

1957

- Aug. 19 Search Warrant with return filed.
- Aug. 20 By Abruzzo, J. order filed assigning James B. Donovan as counsel for Deft.
- Aug. 21 Transcripts of proceedings of Aug. 9-13 and 16 filed.
- Aug. 29 By Abruzzo, J. order filed assigning Arnold Guy Fraiman as counsel for Deft.
- Sept. 11 Notice of Motion filed for Bill of Particulars.
- Sept. 11 Notice of Motion filed for an Order a list of veniremen and witnesses etc.
- Sept. 16 Before Byers, J. case called & Adj: to Sept. 26, 57.
- Sept. 16 Before Byers, J. hearing on motion for Bill of Particulars. Motion argued decision reserved. All Papers by 9-17-57.
- Sept. 16 Before Byers, J. hearing on motion for an Order a list of veniremen and witnesses etc. Motion argued and agreed upon. Submit order.
- Sept. 19 By Byers, J. Order filed that the Deft be furnished a list of witnesses.
- Sept. 20 Notice Pursuant to Title 18 U. S. C. Section 3432 filed.
- Sept. 23 By Byers, J. Decision on Bill of Particulars rendered and denied filed. Settle order.
- Sept. 25 Notice of Jurors summoned filed.
- Sept. 25 Notice of supplemental list of witnesses filed.
- Sept. 26 Affidavit of James B. Donovan filed.
- Sept. 26 Byers, J. Deft and counsels present case adj to Oct. 3-57.
- Sept. 30 Notice of Motion filed directing Asst. Atty General to produce recording etc. and permit Deft. to inspect, copy etc. all statements.

Docket Entries.

1957

- Oct. 1 By Byers, J. Order to Show Cause with proof of service striking part of the indictment filed.
- Oct. 2 By Byers, J. Order to Show Cause with proof of service directing subpoena be declared irregular and void etc. filed signed Oct. 1-1957.
- Oct. 2 Before Byers, J. Hearing on Motion directing Asst. Atty. General to produce recordings etc. Motion argued. Decision reserved.
- Oct. 2 Before Byers, J. Hearing on Order to Show Cause striking part of indictment etc. Motion argued. Decision reserved.
- (C)
- Oct. 2 Before Byers, J. Hearing on Order to Show Cause for an order to set aside subpoena. Motion argued—Decision reserved.
- Oct. 2 Affidavit of James B. Donovan filed.
- Oct. 3 By Byers, J. Decision on Motion striking part of indictment, etc. Denied—filed. Settle Order. (See Memorandum)
- Oct. 3 Notice Pursuant to Title 18 U. S. C. Sec. 3432 filed.
- Oct. 3 Before Byers, J. Deft. and counsels present. Trial ordered and adjd. to Oct. 4, 1957. Motion made orally to suppress and decision reserved.
- Oct. 3 Affidavits of Robert E. Schoenenberger, Edward J. Farley and James P. Kehoe, Filed.
- Oct. 4 Before Byers, J. Deft. present. Trial resumed and adjd. to 10-14-57.
- Oct. 4 By Byers, J. Order filed denying Motion made orally [?] to strike certain allegation from indictment etc.
- Oct. 4 By Byers, J. Decision on Motion directing Asst. Atty. General to produce recordings etc. Denied

Docket Entries.

1957

filed. The Motion of the United States to quash subpoena is granted. (See Memorandum)

- Oct. 8 By Byers, J. Order filed denying Defts. Motion for Bill of Particulars.
- Oct. 8 Before Byers, J. Hearing on Motion to suppress adjd. to 10-9-57.
- Oct. 8 Affidavit of James B. Donovan filed.
- Oct. 9 Affidavit of James B. Donovan filed, motion to suppress concluded. Decision Reserved.
- Oct. 9 Affidavit of Deft. filed.
- Oct. 11 Affidavit of Arnold Guy Fraiman filed.
- Oct. 11 Stenographers minutes of hearing on 10-8-57 filed.
- Oct. 11 Stenographers minutes of hearing on 10-9-57 filed.
- Oct. 11 By Byers, J. Decision on Motion to suppress etc. rendered Motion Denied. Submit order filed (see opinion).
- Oct. 14 Letter dated Oct. 10-57 filed.
- Oct. 14 Before Byers, J. Deft. present. Trial resumed and adjd. to 10-15-57.
- Oct. 15 Before Byers, J. Deft. present. Trial resumed and adjd. to 10-16-57.
- Oct. 16 Before Byers, J. Deft. present. Trial resumed and adjd. to 10-17-57.
- Oct. 17 Before Byers, J. Deft. present. Trial resumed and adjd. to 10-21-57.
- Oct. 18 By Byers, J. Order signed 10-15-57 that subpoena issued for Burton Silverman to appear 10-23-57 to testify etc. filed.

Docket Entries.

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(D)

- Oct. 18 Affidavit of William F. Tompkins filed.
- Oct. 21 By Byers, J. Order filed denying Defts Motion to suppress evidence etc.
- Oct. 21 Before Byers, J. Deft present. Trial resumed. Trial adjd to Oct. 22-57.
- Oct. 22 Before Byers, J. Deft present. Trial resumed. Trial adjd to Oct. 23-57.
- Oct. 23 Before Byers, J. Deft present. Trial resumed. Motion made for Judgment of Acquittal as to each Count of the Indictment and said motion is denied. Trial adjd to Oct. 24-57.
- Oct. 24 Before Byers, J. Deft present. Trial resumed and adjd to 10-25-57.
- Oct. 25 Before Byers, J. Deft present. Trial resumed and Jury return and render a verdict of guilty as charged. Jury polled and each render a verdict of guilty as charged. Motion made to set aside the verdict and same is denied. Deft remanded to Nov. 15-57 for sentence.
- Oct. 25 Governments request to charge filed.
- Oct. 25 Defts request to charge filed.
- Oct. 25 By Byers, J. Order filed denying Defts Motion to directing production of certain written statements and Order granting U. S. for Show Cause Order etc.
- Oct. 25 By Byers, J. Order of Sustenance filed.
- Oct. 28 Stenographers Transcript of Record filed (2 volumes).
- Nov. 15 Stipulation of Facts filed.
- Nov. 15 Before Byers, J. Deft and his attorney's present. Deft is sentenced to be imprisoned for 30 years on Count 1 and is sentenced to be imprisoned for

Docket Entries.

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10 years and to pay a fine of \$2000.00 on Count 2 and is sentenced to be imprisoned for 5 years and to pay a fine of \$1000.00 on Count 3 and to stand committed until said fines be paid or he be discharged as provided by law. Sentences of imprisonment are to run concurrently and fines are to run consecutively.

Nov. 15 Judgment & Commitment filed. Cert. copies delvd to Marshal.

Nov. 20 Stenographers minutes, of Sentence filed.

Nov. 25 Notice of Appeal filed.

(E)

Nov. 26 Copy of Notice of Appeal and Statement of Docket entries mailed to Clerk, U. S. Court of Appeals.

Nov. 26 Notice of Taking Appeal mailed to Warden, Fed. Det. Hqrs. N. Y. C. and to Marshal. E. D. N. Y.

Dec. 4 Election against service of sentence filed.

Dec. 18 Defts questions for examination of prospective Jurors filed.

Dec. 18 Govts proposed questions to Jurors on Voir Dire filed.

Dec. 18 Copy of Motion dated Sept. 13-57 filed.

Dec. 18 Copy of Affidavit of Keven T. Maroney filed.

Dec. 18 Copy of Affidavit of James B. Donovan filed.

Dec. 18 Copy of Motion dated Sept. 17-57 filed.

Dec. 18 Copy of Affidavit of James B. Donovan dated 9-23-57 filed.

Dec. 18 Photosiat of opinion filed.

Dec. 18 Stenographer minutes of Voir Dire filed (2 volumes).

Indictment.

[SAME TITLE.]

(1057) The Grand Jury charges:

COUNT ONE.

1. That from in or about 1948 and continuously thereafter up to and including the date of the filing of this indictment, in the Eastern District of New York; in Moscow, Union of Soviet Socialist Republics; and elsewhere, RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus, the defendant herein, unlawfully, wilfully and knowingly did conspire and agree with Reino Hayhanen, also known as "Vic"; Mikhail Svirin; Vitali G. Pavlov; and Aleksandr Mikhailovich Korotkov, co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to violate Subsection (a) of Section 794, Title 18, United States Code, in that they did unlawfully, wilfully, and knowingly conspire and agree to communicate, deliver and transmit to a foreign Government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and indirectly, documents, writings, photographs, photographic negatives, plans, maps, models, notes, instruments, appliances and information relating to the national defense of the United States of America, and particularly information relating to arms, equipment and disposition of United States Armed Forces, and information relating to the atomic energy program of the United States, with intent and reason to believe that the said documents, writings, (1058) photographs, photographic negatives, plans, maps, models, notes, instruments, appliances and information would be used to the advantage of a foreign nation, to wit, the Union of Soviet Socialist Republics.

2. It was a part of said conspiracy that the defendant and his co-conspirators would collect and obtain, and

Indictment.

attempt to collect and obtain and would aid and induce divers other persons to the Grand Jury unknown, to collect and obtain information relating to the national defense of the United States of America, with intent and reason to believe that the said information would be used to the advantage of the said foreign nation, to wit, the Union of Soviet Socialist Republics.

3. It was further a part of said conspiracy that the Government of the Union of Soviet Socialist Republics and certain of the co-conspirators, including Aleksandr Mikhailovich Korotkov and Mikhail Svirin, being representatives, agents and employees of the Government of the Union of Soviet Socialist Republics, would by personal contact, communications and other means to the Grand Jury unknown, both directly and indirectly, employ, supervise, pay and maintain the defendant and other co-conspirators for the purpose of communicating, delivering and transmitting information relating to the national defense of the United States to the said Government of the Union of Soviet Socialist Republics.

4. It was further a part of said conspiracy that the defendant and certain of his co-conspirators would activate and attempt to activate as agents within the United States certain members of the United States Armed Forces who were in a position to acquire information relating to the national defense of the United States, and would communicate, deliver and transmit, and would aid and induce each other and divers other persons to the Grand Jury unknown, to communicate, deliver and transmit information relating to the national defense of the United States to the Government of the Union of Soviet Socialist Republics.

5. It was further a part of said conspiracy that the defendant and certain of his co-conspirators would use short wave radios to receive instructions issued by said Government of the Union of Soviet Socialist Republics

Indictment.

and to send information to the said Government of the Union of Soviet Socialist Republics.

(1059) 6. It was further a part of said conspiracy that the defendant and certain of his co-conspirators would fashion "containers" from bolts, nails, coins, batteries, pencils, cuff links, earrings and the like, by hollowing out concealed chambers in such devices suitable to secrete therein microfilm, microdot and other secret messages.

7. It was further a part of said conspiracy that the said defendant and his co-conspirators would communicate with each other by enclosing messages in said "containers" and depositing said "containers" in pre-arranged "drop" points in Prospect Park in Brooklyn, New York, in Fort Tryon Park in New York City, and at other places in the Eastern District of New York and elsewhere.

8. It was further a part of said conspiracy that the said defendant and certain of his co-conspirators would receive from the Government of the Union of Soviet Socialist Republics and its agents, officers and employees large sums of money with which to carry on their illegal activities within the United States, some of which money would thereupon be stored for future use by burying it in the ground in certain places in the Eastern District of New York and elsewhere.

9. It was further a part of said conspiracy that the defendant and certain of his co-conspirators, including Reino Hayhanen, also known as "Vic", would assume, on instruction of the Government of the Union of Soviet Socialist Republics, the identities of certain United States citizens, both living and deceased, and would use birth certificates and passports in the name of such United States citizens, and would communicate with each other and other agents, officers and employees of the Government of the Union of Soviet Socialist Republics through the use of numerical and other types of secret codes, and would adopt

Indictment.

other and further means to conceal the existence and purpose of said conspiracy.

10. It was further a part of said conspiracy that defendant and certain of his co-conspirators would, in the event of war between the United States and the Union of Soviet Socialist Republics, set up clandestine radio transmitting and receiving posts for the purpose of continuing to furnish the said Government of the Union of Soviet Socialist Republics with information relating to the national defense of the United States, and would engage in acts of sabotage against the United States.

(1060) In pursuance and furtherance of said conspiracy and to effect the object thereof the defendant and his co-conspirators did commit, among others, in the Eastern District of New York and elsewhere, the following:

OVERT ACTS.

1. In or about the year 1948 Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, the defendant herein, did enter the United States at an unknown point along the Canadian-United States border.

2. In or about the summer of 1952 at the headquarters of the Committee of Information (known as the KI) in Moscow, Union of Soviet Socialist Republics, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did meet with Vitali G. Pavlov, a co-conspirator herein.

3. In or about the summer of 1952 at the headquarters of the Committee of Information (known as the KI) in Moscow, Union of Soviet Socialist Republics, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did meet with Mikhail Svirin, a co-conspirator herein.

4. On or about October 21, 1952, in New York City, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did disembark from the liner "Queen Mary."

Indictment.

5. In or about October 1952, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did go to Central Park in Manhattan, New York City, and did leave a signal in the vicinity of the restaurant known as the Tavern-on-the-Green.

6. In or about 1952, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did go to the vicinity of Prospect Park in Brooklyn within the Eastern District of New York.

7. In or about November 1952, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did go to Fort Tryon Park in New York City and did leave a message.

(1061) 8. In or about December 1952, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did meet and confer with Mikhail Svirin, a co-conspirator herein, in the vicinity of Prospect Park in Brooklyn within the Eastern District of New York.

9. In or about the summer of 1953, Mikhail Svirin, a co-conspirator herein, did meet and confer with Reino Hayhanen, also known as "Vic", a co-conspirator herein, in the vicinity of Prospect Park in Brooklyn, within the Eastern District of New York, and did give to Hayhanen a package of soft film.

10. On or about December 17, 1953, the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, did rent a studio consisting of one room on the fifth floor of the building located at 252 Fulton Street, Brooklyn, within the Eastern District of New York.

11. In or about August or September 1954, the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, did meet with Reino Hayhanen, also known as "Vic", a co-conspirator herein, in the vicinity of the Keith's RKO

Indictment.

theater, Flushing, Long Island, within the Eastern District of New York.

12. In or about the summer of 1954 the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, and Reino Hayhanen, also known as "Vic", a co-conspirator herein, did go by automobile to the vicinity of New Hyde Park, Long Island, within the Eastern District of New York.

13. In or about March or April 1955, the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, and Reino Hayhanen, also known as "Vic", a co-conspirator herein, did proceed by automobile from New York City to Atlantic City, New Jersey.

14. In or about the spring of 1955, Reino Hayhanen, also known as "Vic", a co-conspirator herein, did proceed by automobile from New York City to the vicinity of Quincy, Massachusetts, at the direction (1062) of defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins.

15. In or about December, 1954 or January, 1955 Reino Hayhanen, also known as "Vic", a co-conspirator herein, did proceed by rail transportation from New York to Salida, Colorado, at the direction of the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil Goldfus and Martin Collins.

16. In or about the spring of 1955, the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, and Reino Hayhanen, also known as "Vic", a co-conspirator herein, did proceed from New York City to the vicinity of Poughkeepsie, New York, for the purpose of locating a suitable site for a short-wave radio.

17. In or about the spring of 1955, the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as

Indictment.

Emil R. Goldfus and Martin Collins, in the vicinity of 252 Fulton Street, Brooklyn, New York, within the Eastern District of New York, did give a short-wave radio to Reino Hayhanen, also known as "Vic", a co-conspirator herein.

18. In or about 1955 the defendant Rudolf Ivanovich Abel, also known as "Mark" and also known as Emil R. Goldfus and Martin Collins, did bring a coded message to Reino Hayhanen, also known as "Vic", a co-conspirator herein, and did request him to decipher said message.

19. In or about February 1957, the defendant Rudolf Ivanovich Abel, also known as "Mark", and also known as Emil R. Goldfus and Martin Collins, did meet and confer with Reino Hayhanen, also known as "Vic", a co-conspirator herein, in the vicinity of Prospect Park, Brooklyn, within the Eastern District of New York, and did then and there give to Hayhanen a birth certificate and two hundred dollars in United States currency.

(In violation of 18 U. S. C. 794(c))

(1063) COUNT TWO:

The Grand Jury further charges;

1. That from in or about 1948 and continuously thereafter and up to and including the date of the filing of this indictment, in the Eastern District of New York, in Moscow, Union of Soviet Socialist Republics; and elsewhere, Rudolf Ivanovich Abel, also known as "Mark", and also known as Martin Collins and Emil R. Goldfus, the defendant herein, unlawfully, wilfully and knowingly did conspire and agree with Reino Hayhanen, also known as "Vic"; Mikhail Svirin; Vitali G. Pavlov; and Aleksandr Mikhailovich Korotkov, co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to violate Sub-section (c) of Section 793, Title 18, United States Code, in the manner and by the means hereinafter set forth.

Indictment.

2. It was a part of said conspiracy that the defendant and his co-conspirators would, for the purpose of obtaining information respecting the national defense of the United States of America, receive and obtain and attempt to receive and obtain documents, writings, photographs, photographic negatives, plans, maps, models, instruments, appliances, and notes, of things connected with the national defense of the United States, knowing and having reason to believe at the time of said agreement to receive and obtain said documents, writings, photographs, photographic negatives, plans, maps, models, instruments, appliances, and notes of things connected with the national defense, that said material would be obtained, taken, made and disposed of contrary to the provisions of Chapter 37, Title 18, United States Code, in that they would be delivered and transmitted, directly and indirectly, to a foreign Government, to wit, the Union of Soviet Socialist Republics and to representatives, officers, agents and employees of the said Union of Soviet Socialist Republics, and the said defendant intending and having reason to believe that the said documents, writings, photographs, photographic negatives, plans, maps, models, instruments, appliances and notes of things relating to the national defense of the United States of America, would be used to the advantage of a foreign nation, to wit, the said Union of Soviet Socialist Republics.

(1064) 3. It was further a part of said conspiracy that the said defendant and his co-conspirators would make contact with persons to the Grand Jury unknown, who were resident in the United States, and at places to the Grand Jury unknown, and who, by reason of their employment, position or otherwise, were acquainted and familiar with and were in possession of or had access to information relating to the national defense of the United States of America.

4. It was further a part of said conspiracy that the defendant and certain of his co-conspirators would activate

Indictment.

and attempt to activate as agents within the United States certain members of the United States Armed Forces who were in a position to acquire information relating to the national defense of the United States, and would communicate, deliver and transmit, and would aid and induce each other and divers other persons to the Grand Jury unknown, to communicate, deliver and transmit information relating to the national defense of the United States to the Government of the Union of Soviet Socialist Republics.

5. It was further a part of said conspiracy that the defendant and certain of his co-conspirators would use short wave radios to receive instructions issued by said Government of the Union of Soviet Socialist Republics and to send information to the said Government of the Union of Soviet Socialist Republics.

6. It was further a part of said conspiracy that the defendant and certain of his co-conspirators would fashion "containers" from bolts, nails, coins, batteries, pencils, cuff links, earrings, and the like, by hollowing out concealed chambers in such devices suitable to secrete therein microfilm, microdot and other secret messages.

7. It was further a part of said conspiracy that the said defendant and his co-conspirators would communicate with each other by enclosing messages in said "containers" and depositing said "containers" in pre-arranged "drop" points in Prospect Park in Brooklyn, New York, in Fort Tryon Park in New York City, and at other places in the Eastern District of New York and elsewhere.

(1065) 8. It was further a part of said conspiracy that the said defendant and certain of his co-conspirators would receive from the Government of the Union of Soviet Socialist Republics and its agents, officers and employees large sums of money with which to carry on their illegal activities within the United States, some of which money would thereupon be stored for future use by burying it in the

Indictment.

ground in certain places in the Eastern District of New York and elsewhere.

9. It was further a part of said conspiracy that the defendant and certain of his co-conspirators, including Reino Hayhanen, also known as "Vic", would assume, on instruction of the Government of the Union of Soviet Socialist Republics, the identities of certain United States citizens, both living and deceased, and would use birth certificates and passports in the name of such United States citizens, and would communicate with each other and other agents, officers and employees of the Government of the Union of Soviet Socialist Republics through the use of numerical and other types of secret codes, and would adopt other and further means to conceal the existence of said conspiracy.

10. It was further a part of said conspiracy that defendant and certain of his co-conspirators would, in the event of war between the United States and the Union of Soviet Socialist Republics, set up clandestine radio transmitting and receiving posts for the purpose of continuing to furnish the said Government of the Union of Soviet Socialist Republics with information relating to the national defense of the United States, and would engage in acts of sabotage against the United States.

OVERT ACTS.

In pursuance and furtherance of said conspiracy and to effect the object thereof, the defendant and his co-conspirators did commit, among others, within the Eastern District of New York and elsewhere, the overt acts as alleged and set forth under Count One of this indictment, all of which overt acts are hereby re-alleged by the Grand Jury. (Section 793, Title 18, United States Code).

Indictment.

(1066) COUNT THREE.

The Grand Jury further charges:

1. That throughout the entire period from in or about 1948 and up to and including the date of the filing of this indictment, the Government of the Union of Soviet Socialist Republics, through its representatives, agents and employees, maintained within the United States and other parts of the world, a system and organization for the purpose of obtaining, collecting and receiving information and material from the United States of a military, commercial, industrial and political nature, and in connection therewith, recruited, induced, engaged and maintained the defendant and co-conspirators hereinafter named and divers other persons to the Grand Jury unknown, as agents, representatives and employees to obtain, collect and receive such information and material for the said Government of the Union of Soviet Socialist Republics.
2. That from in or about 1948 and continuously thereafter up to and including the date of the filing of this indictment in the Eastern District of New York; in Moscow, Union of Soviet Socialist Republics; and elsewhere, Rudolf Ivanovich Abel, also known as "Mark", and also known as Martin Collins and Emil R. Goldfus, the defendant herein, unlawfully, wilfully and knowingly did conspire and agree with the Government of the Union of Soviet Socialist Republics, and with agents, officers, and employees of the said Government of the Union of Soviet Socialist Republics, including Aleksandr Mikhailovich Korotkov, Vitali G. Pavlov, Reino Hayhanen, also known as "Vic", co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to commit an offense against the United States of America, to wit, to violate Section 951, Title 18, United States Code, in the manner and by the means hereinafter set forth.

Indictment.

3. It was a part of said conspiracy that the defendant and Reino Hayhanen, also known as "Vic", and other co-conspirators to the Grand Jury unknown, none of whom were included among the accredited diplomatic or consular officers or attachés of the said Government of the Union of Soviet Socialist Republics or of any foreign government, (1067) would, within the United States, and without prior notification to the Secretary of State, act as agents of the said Government of the Union of Soviet Socialist Republics, and would, as such agents, obtain, collect, and receive information and material of a military, industrial and political nature, and as such agents would communicate and deliver said information and material to other co-conspirators for transmission to the said Government of the Union of Soviet Socialist Republics. It was also a part of the said conspiracy that co-conspirators residing outside the United States would direct, aid and assist the defendant and certain co-conspirators as aforesaid to act as such agents within the United States and would receive and transmit the said information and material to the said Government of the Union of Soviet Socialist Republics.

4. It was further a part of the said conspiracy that the said Government of the Union of Soviet Socialist Republics and its officers, agents and employees would employ, supervise and maintain the defendant and Reino Hayhanen, also known as "Vic", within the United States as such agents of the said Government of the Union of Soviet Socialist Republics for the purpose of obtaining, collecting, receiving, transmitting and communicating information and material of a military, commercial, industrial and political nature.

5. It was further a part of the said conspiracy that the defendant and certain of his co-conspirators would receive sums of money and other valuable considerations from the government of the Union of Soviet Socialist Republics, its officers, agents and employees, in return for

Indictment.

acting as said agents of the Union of Soviet Socialist Republics within the United States for the purpose of obtaining, collecting, receiving, transmitting and communicating information, material, messages and instructions on behalf and for the use and advantage of the said Government of the Union of Soviet Socialist Republics.

6. It was further a part of said conspiracy that the said defendant and his co-conspirators would use false and fictitious names, coded communications, and would resort to other means to the Grand Jury unknown to conceal the existence and purpose of said conspiracy.

(1068) OVERT ACTS.

In pursuance and furtherance of said conspiracy and to effect the object thereof, the defendant and his co-conspirators did commit, among others, within the Eastern District of New York and elsewhere, the overt acts as alleged and set forth under Count I of this indictment, all of which overt acts are hereby realleged by the Grand Jury. (In violation of Section 371, Title 18, United States Code)

EDWARD M. DURNER,
Foreman.

WILLIAM F. TOMPKINS,

WILLIAM F. TOMPKINS
Assistant Attorney General.

LEONARD P. MOORE,

C. W. W. J.

LEONARD P. MOORE
United States Attorney.

**Assignment of James B. Donovan as
Counsel for Appellant.**

(1142)

UNITED STATES OF AMERICA v. RUDOLF IVANOVICH ABEL

On August 16, 1957, the defendant appeared before me and stated that he had not been able to obtain an attorney. He requested that the Court assign counsel recommended by the Bar Association. Pursuant to the defendant's request, the Brooklyn Bar Association was asked to recommend an experienced attorney.

The Bar Association has recommended that I assign James B. Donovan, 161 William Street, New York. I am wholly in accord with this recommendation as I know that Mr. Donovan is well qualified and learned in the law. I, therefore, assign James B. Donovan as chief counsel for the defendant. This Court is highly gratified by the public service that Mr. Donovan is about to render in the tradition of the Brooklyn Bar Association.

It appears to me that Mr. Donovan should have assistance because of the gravity of the charge and the work necessary to be done for this defendant. Sometime this week it is my intention to assign associate counsel to assist Mr. Donovan. The Brooklyn Bar Association is cooperating with me to that end.

MATTHEW T. ABRUZZO
United States District Judge

Dated: August 20, 1957

Notice of Motion to Suppress.

[SAME TITLE.]

(1659)

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Rudolf Ivanovich Abel, duly sworn to on the 13th day of September, 1957, and the exhibits attached thereto, and

Notice of Motion to Suppress.

the annexed affidavit of James B. Donovan, duly sworn to on the 13th day of September, 1957, the undersigned will move this Court at Room 318, at the United States Court House, Foley Square, in the City, County and State of New York, on the 23rd day of September, 1957, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order pursuant to the provisions of Rule 41(e) of the Federal Rules of Criminal Procedure:

Directing the Respondent, United States of America, to return and to suppress for use as evidence any (1660) and all property seized on the 21st day of June, 1957 in Room 839, Hotel Latham, 4 East 28th Street, New York, New York upon the ground that said property was illegally seized without warrant, contrary to the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.,
September 13, 1957.

Yours, etc.

JAMES B. DONOVAN, Esq.

ARNOLD GUY FRAMAN, Esq.

Attorneys for Defendant, Rudolf
Ivanovich Abel

Office and Post Office Address:

c/o Brooklyn Bar Association

123 Remson Street
Brooklyn, New York.

To:

PAUL W. WILLIAMS, Esq.

United States Attorney

United States Court House

Foley Square

New York, New York.

Affidavit of James B. Donovan, in Support of Motion.

[SAME TITLE.]

(1661)

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss:

JAMES B. DONOVAN, being duly sworn, deposes and says:

I am the attorney for the petitioner, Rudolf Ivanovich Abel, in this proceeding under Rule 41(e) of the Federal Rules of Criminal Procedure ("Motion for Return of Property and to Suppress Evidence") and this affidavit is submitted in support thereof.

RELATED PRIOR PROCEEDINGS.

On August 9, 1957 a plea of "Not Guilty" was entered on behalf of Abel, in United States District Court for the Eastern District of New York, to an indictment dated August 7, 1957 which, in substance, charges that the defendant conspired with others, including the Government of the (1662) Union of Soviet Socialist Republics, all named in the indictment as co-conspirators but not defendants, to violate specific sections of the United States Code relating to espionage.

The first count of the indictment charges the defendant with a violation of Section 794(c) of Title 18, United States Code, by conspiring to violate Sec. 794(a); the second count charges a violation of Sec. 793(g) of Tit. 18, U. S. C., by conspiring to violate Sec. 793(c); the third count charges a violation of Sec. 371 of Tit. 18, U. S. C., by conspiring to violate Sec. 951. The first count charges a capital crime.

On August 20, 1957 in the Eastern District, Matthew T. Abruzzo, D. J., assigned your deponent as chief defense counsel for Abel. On August 29th, 1957 Arnold Guy Fraiman, Esq. was assigned by the Court as associate trial counsel.

Affidavit of James B. Donovan, in Support of Motion.

By direction of the Court in the Eastern District, motions in the criminal proceedings against Abel are returnable before Hon. Mortimer W. Byers, D. J., on September 16, 1957. Three applications will be considered: (a) that the Court direct that trial be held at the earliest possible date consistent with a proper opportunity for defense counsel to prepare adequately a defense; (b) that a list of the veniremen and all Government witnesses, pursuant to Sec. 3432, Tit. 18, U. S. C., be furnished to defense counsel at least four weeks prior to trial; and (c) that the Government furnish a bill of particulars of the indictment pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure.

(1663) This independent proceeding is commenced in this Court because the property in question was searched and seized within this District and the Government officers responsible for the search and seizure have their principal offices in this District. Rule 41(e), Federal Rules of Criminal Procedure; *U. S. v. Klapholz*, 230 F. 2d 494 (1956).

BASIS OF THIS PROCEEDING.

The affidavit of Abel in this proceeding, sworn to September 13, 1957, was prepared by counsel after many hours of reviewing the facts with him and after he had been advised that in his own interests the statements should be as precise and scrupulously truthful as possible. I have carefully compared his affidavit with all other affidavits filed by Government officers or employees in connection with the criminal proceedings; I have found no inconsistencies, although many of the details set forth in Abel's affidavit do not appear in such affidavits. Under these circumstances, your deponent must assume that the facts related by Abel are true and this affidavit is predicated on such assumption.

Your deponent accordingly petitions this Court, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, that all property of petitioner, seized in Room 839 of the Hotel Latham, 4 East 28th Street, Manhattan,

Affidavit of James B. Donovan, in Support of Motion.

New York City, on June 21, 1957 he returned and that all property so obtained be suppressed for use as evidence on the ground that the property was illegally seized without warrant, contrary to the provisions of the Fourth and Fifth Amendments to the Constitution of the United States.

THE FACTS.

(1664) The following statement of facts is based upon all prior proceedings in the criminal case against Abel, including all affidavits filed therein, and the annexed affidavit of Abel.

Prior to June 21, 1957 (and probably for a considerable period of time) the F. B. I. believed that a Soviet spy named Abel, with the high rank of "Colonel", was living in Room 839 of the Hotel Latham in this District under the name of "Martin Collins". Abel had been under surveillance and the F. B. I. believed that they knew his agents.

On the morning of June 21, 1957 agents of the F. B. I. obtained entrance to Abel's room and endeavored to persuade him to "cooperate". When Abel refused, the F. B. I. agents called into the room several Immigration officers who had been waiting in the hallway outside. The latter then arrested him on a civil warrant issued the preceding night by the Immigration and Naturalization Service. They searched his room and seized his personal effects and property. He was checked out of the hotel by the officers. He was taken the same day by special airplane to a remote detention camp in McAllen, Texas.

Although he promptly requested counsel in McAllen, his request was denied and he was held incommunicado for five days, with daily questioning. He finally decided to state that his name was Abel, that he was a Russian citizen (1665) and that he entered the United States from Canada in 1948 with a forged American passport. He then was permitted to see a lawyer and thereafter, with counsel, made similar statements in a closed Immigration and Naturalization hearing in the Texas camp.

Affidavit of James B. Donovan, in Support of Motion.

From June 21st to mid-July, F. B. I. agents questioned him daily in an effort to persuade him to disclose his alleged operations and to "cooperate" with the United States Government. Immigration and Naturalization officers aided in the questioning. Both the Service and the F. B. I. are within the Department of Justice.

From June 21st to August 7th, Abel was treated by the Department of Justice, as a matter of law, as an alien illegally in the United States. Actually, however, it is evident that the Department believed that he had committed the capital crime of Russian espionage and this was the principal interest of the Government in the man. Such undoubtedly was considered to be in our national interest. Any person familiar with counter-espionage realizes that a defecting enemy agent can be of far greater value than one of our own operating agents. Not only is there the opportunity for our Government to obtain complete information on the enemy's espionage apparatus but it can lead to such specifics as the names and locations of other enemy agents, the breaking of enemy ciphers, etc. Moreover, there can be the possibility of using such a man as a "double agent" who, although believed by his original principals to be still working on their behalf, in reality is serving the other side.

(1666) However, the Constitution and laws of the United States are clear on the procedures which must be followed in order to arrest an individual and to search and seize property in his control or possession. In the instant case, for example, absent an indictment, the F. B. I., having reason to believe that a Russian spy was in Room 839 at the Hotel Latham, would obtain a warrant for his arrest from a U. S. Commissioner or federal judge, charging him with espionage. In the event the man was arrested in Room 839, the law is clear that the agents could search the room and seize anything which could be considered as the instruments or means of committing espionage, the crime charged. The prisoner would then be taken before the

Affidavit of James B. Donovan, in Support of Motion.

nearest available U. S. Commissioner or federal judge "without unnecessary delay", where he would be entitled to consult counsel. He would then be remanded to a federal prison. In the event the agents wished to search Room 839, in the absence of its occupant, they could have obtained a search warrant by complying with equally clear and precise procedure.

Sometime prior to June 21, 1957 the Department of Justice, believing Abel to be a spy, had to make a decision with respect to him. The F. B. I. possesses the dual functions of a law enforcement agency and of a counter-espionage arm of our national intelligence forces. The decision had to be made as to whether:

(a) As law enforcement officers, they should arrest Abel on charges of espionage, conduct any lawful search and seizure, and follow all other procedures established under the Constitution and laws of the United States; or

(1667) (b) As counter-espionage agents, fulfilling a national intelligence function, they should seize Abel, conceal his detention from his co-conspirators for the longest possible time, and meanwhile seek to induce him to come over to our side.

The election between the two alternate courses of action was made. While that election may have been prospectively in the best interests of the United States, it did not succeed. The Government thereafter cannot pretend that such an election was not made, or attempt to pay lip service to due process of law.

THE LAW.

The Fourth Amendment to the Constitution of the United States is clear:

"The right of the people to be secure in their persons, houses, papers, and effects, against unrea-

Affidavit of James B. Donovan, in Support of Motion.

sonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The abuses before the Revolution which led to the adoption of this Amendment are well known. Based on the facts in this case, it is the belief of your deponent that the Fourth and Fifth Amendments to the Constitution, as interpreted by the Supreme Court of the United States, have been violated. *Harris v. U. S.*, 331 U. S. 145 (1947); cf. *In re Ginsberg*, 147 F. 2d 749 (2d Cir. 1945).

Abel is an alien charged with the capital offense of Soviet espionage. It may seem anomalous that our constitutional guarantees protect such a man. The unthinking may view America's conscientious adherence to the principles (1668) of a free society as altruism so scrupulous that self-destruction must result. Yet our principles are engraved in the history and the law of this land. If the free world is not faithful to its own moral code, there remains no society for which others may hunger.

JAMES B. DONOVAN

Sworn to before me this 13th }
day of September, 1957. }

MINNIE E. McINTURFF

Notary Public, State of New York
No. 31-2492175

Qualified in New York County
Commission Expires March 30, 1959

**Affidavit of Rudolf Ivanovich Abel, in
Support of Motion.**

[SAME TITLE.]

(1669)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RUDOLF IVANOVICH ABEL, being duly sworn, deposes and says:

I am the petitioner in this proceeding and this affidavit is submitted in support thereof.

On May 18, 1957 I registered at the Hotel Latham, 4 East 28th Street, Manhattan, New York City, under the name of "Martin Collins". I rented Room 839 for \$28.00 per week, payable at the end of each week on Saturday.

Room 839 was on the eighth floor of the hotel and a small bathroom was attached. The room was approximately 10 feet wide and 13 feet deep. It contained a double bed, a low chest of drawers, a small desk, two chairs and a folding baggage rack. A clothes closet, with a door, protruded into the room.

(1670) About 7:30 A. M. on the morning of Friday, June 21st there was a knock on my door, which awakened me. The night had been warm and I had been sleeping naked on top of the sheets. Without putting on any clothes, I opened the door a few inches to see who was there. Three men pushed their way in. They said that they were "agents of the F. B. I." and exhibited identification cards in wallets. I assumed that they were armed but I do not recall seeing any weapons displayed. They told me to sit down on the bed and I did so, still naked.

For the next five minutes the three men, who said their names were Phelan, Gamber, and Vlasco (or Blasco), talked to me. They said: that they "knew all about me"; that they had been following me and knew all my "agents". They urged me to "cooperate". I said that I did not know what they were talking about; that I had a right not to talk and that I did not wish to do so. After awhile, I

Affidavit of Rudolf Ivanovich Abel, in Support of Motion.

received permission to, and did, put on a pair of underwear shorts.

Throughout the questioning they addressed me as "Colonel", although I never had used this title or any similar title in the United States. At no time did these men place me under arrest.

At the end of the five minutes, one of the agents told a second to "bring in the others"; the second agent opened the door and called in three or four more men from the hallway. These men exhibited other identification cards (1671) and stated that they were Immigration officers. They showed me a Department of Justice warrant for my arrest and detention as an alien illegally in the United States, dated June 20th, 1957, a copy of which I attach to this affidavit as Exhibit "A". They told me I was under arrest. They showed me another paper which I since have learned to be an "Order to Show Cause and Notice of Hearing", issued by the Immigration and Naturalization Service of the Department of Justice to commence deportation proceedings against me. This stated that I would have a hearing at 70 Columbus Avenue, Manhattan, at 2:30 P. M. on July 1, 1957. A copy of this paper is attached hereto at Exhibit "B". Both papers were addressed to me as "Martin Collins alias Emil Goldfuss". At their request that I acknowledge service of these papers I signed "Martin Collins" on a copy.

My room by now was overcrowded. The Immigration officers proceeded to search the premises. I assumed that they had the right to do so. The search appeared to be conducted principally by the Immigration officers but the F. B. I. men remained throughout the search. They searched the clothes I had worn the night before, which were piled on top of the bureau; they opened the clothes closet, searched the clothing hanging there and removed my suitcases, spreading their contents on the bed. All my belongings in the bureau were removed, searched and then packed in my suitcases. My toilet articles in the bathroom also were searched and packed.

Affidavit of Rudolf Ivanovich Abel, in Support of Motion.

All objects seized in my room are owned by me. I have not seen them since June 21st.

(1672) At the end of about an hour, the Immigration officers told me to dress, took the packed suitcases and my other property, handcuffed me and led me out of the room. Before leaving, at their request I authorized them to pay the rent through that day (June 21st) and they stated that they would check me out of the hotel. We left the hotel by a rear door, entered a waiting sedan and went to Immigration headquarters at 70 Columbus Avenue, Manhattan. I was fingerprinted, photographed and held there until approximately 4:30 P. M., when I was taken by car to an airport near Newark, New Jersey.

At the airport I entered what appeared to be a special DC-3, in which I and two Immigration officers named Seely and Judge were the sole passengers. I asked them our destination and both stated that they did not know. My handcuffs were removed while I was aboard the plane. The plane stopped once about five hours later and I believe that it was in Alabama. At approximately 4:30 A. M. the next morning (Saturday, June 22nd) we arrived at what I learned to be Brownsville, Texas. Here I was re-handcuffed, we entered a waiting car which was accompanied by another car, and we drove sixty miles to McAllen, Texas. There I was placed in solitary confinement in a cell within a Federal detention camp for aliens.

After two hours' sleep I was given breakfast and at about 9:00 A. M. I was led to a room where I was questioned until mid-afternoon (with a break for lunch) by Seely and Judge. At the outset of this questioning I requested a lawyer but was told that this would be appropriate only at a later, "formal" proceeding.

(1673) The following day (Sunday, June 23rd) I was questioned all day by Gamber and Vlasco (two of the F. B. I. agents who had first entered my room in the Hotel Latham) and, as a separate team, by Seely and Judge. The questioners worked in relays. I refused to say anything. I received lunch but, except for that intermission, I was

Affidavit of Rudolf Ivanovich Abel, in Support of Motion.

questioned steadily from approximately 10:00. A. M. until 4:00 P. M.

This same procedure was repeated on Monday, June 24th. On Tuesday, June 25th, I decided to state that my real name was Rudolf Ivanovich Abel; that I was a Russian citizen; that I had found a large sum of American money in a ruined blockhouse in Russia; that I then bought in Denmark a forged American passport and with this passport I entered the United States from Canada in 1948. They thereupon ended the questioning and informed me that I now could see a lawyer. That afternoon I obtained a lawyer in McAllen and he visited me.

On June 27th, 1957, accompanied by counsel, I appeared before Immigration officials at a hearing at the detention camp. I stated that my true name was Rudolf Ivanovich Abel; that I entered the country illegally from Canada in 1948; that during my residence here I had used the names "Emil Goldfus" and "Martin Collins" at various times and places; and that I was a citizen of the U. S. S. R. I was asked to state the country to which I wished to be deported and I answered, the U. S. S. R.

(1674) For approximately three weeks thereafter I was questioned daily by various F. B. I. agents. They stated over and again that if I would "cooperate" they would get me good food, liquor, an air-conditioned room in a Texas hotel, and that they could assure me a job eventually with another U. S. Government agency. I refused to discuss such matters and at the end of three weeks I was no longer questioned.

While held in the cell at McAllen, I was given two type-written lists of some of the property seized in my room at the Hotel Latham on June 21st. Copies of these lists are annexed hereto as Exhibits "C" and "D". I since have been shown by my court-assigned counsel in New York affidavits of Joseph F. Phelan of the Federal Bureau of Investigation and Edward A. Boyle of the Immigration and Naturalization Service, which refer to the search and seizure of my property at the Latham. The events of June 21, 1957

Affidavit of Rudolf Ivanovich Abel, in Support of Motion.

described in these affidavits are correct, to the best of my knowledge, but they omit many of the facts set forth above, such as the F. B. I. visit to my room before the Immigration officers entered. These affidavits are annexed hereto as Exhibits "E" and "F".

During my sixth week in the McAllen jail, I was served by Agent Phelan of the F. B. I., and another agent, with a criminal warrant for my arrest. I was told about but was not given a copy of an indictment dated August 7, 1957 which charges me with the crime of espionage. It is (1675) my understanding that this is a capital offense under the laws of the United States.

Thereafter I was brought before a United States Commissioner in Edinberg, Texas and waived extradition to New York. I was taken by plane to the Federal House of Detention, Manhattan, New York City, where I since have been held in maximum security.

On August 9th, 1957 I appeared in U. S. District Court for the Eastern District of New York and the Judge ordered a plea of "Not Guilty" entered in my behalf. I subsequently requested a copy of the indictment, which was given to me, and also requested that the Court assign me counsel recommended by the Bar Association. Two attorneys since have been so assigned for my defense.

My court-assigned counsel have discussed with me the search and seizure of my property on June 21, 1957 at the Hotel Latham and have explained to me what they consider to be the applicable provisions of law. I have instructed them to institute whatever legal proceedings are appropriate in this respect and to assert any rights which I may possess under the Constitution and laws of the United States.

RUDOLF IVANOVICH ABEL

Sworn to before me this 13th }
day of September, 1957. }

HOWARD E. FRANCIS
Parole Officer.

**Exhibit A, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.**

Warrant for Arrest of Alien.

(1676)

UNITED STATES OF AMERICA

DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION SERVICE

No. A 11 056 666

To any officer in the service of the United States Immigration and Naturalization Service.

WHEREAS, from evidence submitted to me, it appears that the alien Martin Collins alias Emil R. Goldfuss who entered this country at an unknown point from Canada during 1949, is within the United States in violation of the immigration laws thereof, and is therefore liable to being taken into custody as authorized by section 242 of the Immigration and Nationality Act.

Now, THEREFORE, by virtue of the power and authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I hereby command you to take the above named alien into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations. The expenses of detention hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service"

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 20th day of June, 1957.

JOHN L. MURFF.

John L. Murff

Acting District Director
New York, N. Y.

**Exhibit B, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.**

Order to Show Cause and Notice of Hearing.

(1677)

**UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE**

UNITED STATES OF AMERICA:

File No. A 11,056 666

IN THE MATTER

of

MARTIN COLLINS

Alias

EMIL R. GOLDFUS

Respondent.

**In Deportation Pro-
ceedings under
Section 242 of the
Immigration and
Nationality Act.**

To:

Martin Collins

Hotel Latham, 4 E. 28th St., New York, N. Y.

**IT APPEARING, That you are in the United States in viola-
tion of law in that:**

- 1. You are not a citizen or national of the United States;**
- 2. You are a native of Russia and a national of the
Union of Soviet Socialist Republics.**
- 3. You last entered the United States at an unknown
point across the boundary from Canada in 1949;**
- 4. You failed to notify the Attorney General of your
address during January 1956 and during January 1957;**

*Exhibit B, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

5. You did not furnish notice of your address because you feared that by so doing you would disclose your illegal presence in the United States; and that you are subject to be taken into custody and deported pursuant to the following provision(s) of law: Section 241 (a) (5) of the Immigration and Nationality Act, in that, you have failed to furnish notification of your address in compliance with the provisions of Section 265 and have not established that such failure was reasonably excusable or was not wilful.

It IS ORDERED, That you appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 70 Columbus Ave., New York, N. Y. on July 1, 1957 at 2 p. m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

IMMIGRATION AND NATURALIZATION SERVICE

JOHN L. MURFF,
Acting District Director,
New York, N. Y.

Dated: June 20, 1957

(1678)

NOTICE TO RESPONDENT.

The copy of this order served upon you is evidence of your alien registration while you are under deportation proceedings. The law requires that it be carried with you at all times.

You may be represented in this proceeding by an attorney or other representative authorized to practice before the Immigration and Naturalization Service. Such representation must be without expense to the Government. You

*Exhibit B, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof.

When you appear, you will be permitted, if you wish, to admit that the allegations contained in the within order are true and that you are deportable from the United States on the charges set forth therein. Such admission will constitute a waiver of any further hearing as to your deportability. If you do not admit the allegations contained in the within order, you will be given reasonable opportunity to present evidence on your own behalf, to examine the evidence, and cross-examine the witnesses presented by the Government.

Whether or not you admit the allegations contained in the within order, you will have an opportunity at the hearing to apply for any discretionary relief from deportation to which you believe you are entitled. The hearing in your case is subject to continuance or postponement at the direction of the Special Inquiry Officer.

You are subject to arrest and detention in the custody of the Immigration and Naturalization Service. Your failure to appear for hearing at the time and place designated may result in such arrest and detention without further notice.

ACKNOWLEDGMENT OF SERVICE.

I hereby acknowledge receipt of a copy of the within order and above notice.

.....
(date)

.....
(signature of respondent)

Before:

.....
(signature and title of witnessing officer)

***Exhibit C, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.***

REQUEST FOR PROMPT HEARING.

To expedite determination of my case, I request a hearing on the date specified herein, and waive any right I may have to more extended notice.

.....
(date)

.....
(signature of respondent)

Before:

.....
(signature and title of witnessing officer)

CERTIFICATE OF SERVICE.

This order and notice were served on me on
(date)

in the following manner:

Dated:

.....
(signature and title of employee or officer)

***Exhibit C, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.***

(1680)

1. Three metal containers of 35 mm film.
2. One magazine of EKTACHROME 35 mm film.
3. One strip of paper which contains a note consisting of four typewritten lines starting with the word "BALMORA" and ending with the word "hand."
4. One strip of paper which contains a note consisting of two typewritten lines starting with the word

*Exhibit C, Annexed to Affidavit of Rudolph I. Abel,
in Support of Motion.*

"Mr. VLADINEC" and ending with the word
"Jack."

5. One strip of paper on which appears the following:
"ALAN 100 HARV 100 BOX 20 RUT 100 TK 75."
6. One slip of paper which contains printing on two sides. The first side of the note begins with "As you told..." and ends with the word "ARRIVES."
7. One strip of graph paper which contains a note consisting of four handwritten lines starting with the word "In Mex." and ends with "BALMORA."
8. One strip of paper which contains a note consisting of two typewritten lines starting with the word "EMANUEL" and ending with the word "GAS-TEIN."
9. One green and aluminum container with metal cap which houses a red lead pencil.
10. One red covered notebook with the first four pages consisting of handwritten notes.
11. One key with number 1077. This key has a white tag attached on which appears the number 2508.
12. One key which bears stamp of "L. L. BATES CO Boston."
13. One key on which is attached a metal identification tag with number "2508" and green identification tag which has notation of "Safe Deposit Box."
14. One Yale key with serial number of 311789.
15. One key case containing six keys.
16. One strip of graph paper containing a series digits in groups of fives. The first group of digits is identified as "02505" and the last group is identified as "25658".

*Exhibit C, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

17. One strip of graph paper consisting of six lines written in a foreign language.
18. One red colored lead pencil identified as: "ASTRA" 1134T".
19. One metal lens with rubber cap.
20. One bill bearing #CC51762 for sum of \$200.85.
21. Camera Craft Bill #CC2388 for sum of \$120.51.
22. One piece of graph paper covered with figures— 3_2 3_2 3_2 in upper lefthand corner.
23. One piece of graph paper (400 KC) on righthand side.
24. One piece of graph paper with "Lenses" in upper lefthand corner.
25. One piece of graph paper with "Lathé 6 "atlas" in upper lefthand corner.
26. One piece of graph paper with "5a" in upper lefthand corner and "d-2" in lower righthand corner.
27. One piece of graph paper containing a notation "Car with some tools" in upper lefthand corner.
28. One piece of graph paper containing formula $n=n^m+1(M-1 \text{ etc.})$
29. Sketch book—first sheet of which has written "Good Luck and Happy Drawing."
30. One International Certificate of Vaccination for Martin Collins.
31. One sheet memo paper "Victor—35.00" on it; 1 sheet of memo paper with total of "175.56" and "24,710" and one Bill #CC14841 for \$359.99.
32. Two coins, one penny, one dime.

***Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.***

33. Two photographs—one of man, one of woman, with names Shirley and Morris on back.
34. One piece of graph paper with notation "SMTW-TFS" in upper lefthand corner.
35. One piece of graph paper with figure 236.54 in upper righthand corner.
36. One drawing pen.
37. One matchbook cover from Daytona Plaza and one matchbook cover with "Anthony's Italian Cuisine" on it.
40. One Hallicrafter Model S-38-D Radio.

***Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.***

(1681)

One leather case with camera equipment:

- 1 telescopic lens marked Ernst Leitz (#NR898785)
telyt F-20 CM
- 1 Leica camera and case
- 1 piece chamois
- 1 Lens #3320455
- 1 small developing container
- 1 trigger mechanism for camera
- 1 Leica meter with leather case
- 1 lens #1303399
- 1 pen knife
- 1 roll film in black plastic container
- 1 paper tag for "Japan Camera" #040190 dated June, 1956
- 1 utility knife

*Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
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- 1 telescopic lens marked E. Leitz—Wetzlar
- 1 piece copper wire
- 1 wallet
- 1 Warranty card from "Canon Camera Co., 550 Fifth Ave., New York City
- 1 roll color film in white paper
- 1 small lense #15591 (Japan)
- 15 bandaids, 2 buttons, 1 rubber band, 1 handkerchief (white)
- 1 cardboard container with playing cards
- 1 container marked FERD, PIATNIK & SOHNE—Vienna
- 2 boxes "ready-mounts" for transparencies
- 11 transparencies—2 blank holders
- 1 package lens cleaning paper
- 3 color filters in case
- 2 lens & 3 cases
- 1 small black plastic and aluminum container
- 1 cap (metal aluminum)
- 1 brass lens in black case

One book from Schneider & Co., 128 W. 58th, New York City—Artists Materials

One metal container containing artists supplies and paintings and one New Years card

One Brown leather brief case:

- 1 package graph paper
- 1 sheets of ring binder paper
- 2 record discs by Julian Bream
- 1 sketch pad #16084 with drawings
- 7 canvas paintings, 6 blank canvases
- 1 pad graph paper
- 1 sketch book
- 1 green pencil
- 1 yellow pencil

*Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

- 1 travel folder for Silver Springs, Florida
- 12 air mail envelopes
- writing paper

(1682)

One brown leather suitcase:

- 1 Wanamaker grey tweed jacket
- 1 John David grey jacket
- 3 pair grey pants DAKS label
- 1 " oxford grey pants DAKS label
- 1 " oxford grey pants "Majer" label
- 1 " light grey pants DAKS label
- 1 " light grey pants "Majer" label
- 3 ties with "Dublin" label
- 11 pair socks
- 1 sketch book #784
- 1 index book for Kodak color print material
- 2 painted canvases
- 1 developing tray (white porcelain) with miscellaneous photo-material
- 1 bill from Joseph Mayer Co., \$2.02
- 2 pair shorts
- 3 "T" shirts
- 1 sport shirt
- 1 pair checked pajamas
- 1 sleeveless sweater
- 33 handkerchiefs
- 3 shirts
- 1 pajama top

One suitcase #452162—suitcase has tag #452161

- 1 toilet paper
- 1 eraser
- 1 metal pencil "Conte a Paris"
- 1 blue pencil—2B—chisel point
- 1 green pencil—charcoal
- 1 broken metal yellow pencil

*Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
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- 1 raincoat (John David)
 - 1 rain kit cover and case
 - 1 pair pants (Casa Rionda)
 - 2 scarf
 - 1 sweatshirt
 - 1 roll marking tape
 - 1 pajama pants
 - 4 handkerchiefs
 - 1 blue shirt
 - 1 black 3 ring binder with paper
 - 1 pad "Block esuela"
 - 1 "Peerless" white portable radio
 - 1 transparency viewer
 - 1 case toilet articles
 - pipe cleaners
 - 13 greeting cards
 - 1 Park Avenue portfolio with airmail envelopes and graph paper
 - 1 self portrait
 - 2 dish towels
 - 11 boxes drawing leads
 - 1 book (Art Treasures)
 - 1 calling card for Ben (Hobo) Benson (King of the Hoboes)
- (1683).
- 1 package foreign stamp
 - 1 "Old Spice" shaving lotion
 - 1 "Old Spice" cologne
 - 1 can foot powder
 - 1 Thermometer #43602 (Kimble)
 - 1 small reading glass
 - 6 packs Winston cigarettes
 - 1 alarm clock
 - 3 radio tubes
 - 1 can powder for athlete's foot

*Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

- 1 box paint color
- 2 rolls green insulated wire
- 1 wire tap apparatus
- 2 pair pincers
- 1 film container
- 1 bottle aspirin
- 1 shaving brush
- 1 box containing screwdrivers
- 1 pair sun glasses
- 3 pair reading glasses
- 1 bill for \$29.40 from Hotel Latham dated 6/8/57
- 2 tobacco pouches—1 leather, 1 cellophane
- 2 pipes
- 2 pair socks
- 12 yellow pencils
- 1 box AMT tablets
- 1 tube Lepages glue
- 1 bottle athletes foot lotion
- 1 container "Stoppette"
- 1 ivory container
- 1 cigarette lighter
- 3 large erasers
- 3 oblong leads (drawing)
- 1 roll bandage
- 1 metal pipe cleaner (IMCOS)
- 1 black rubber stopper
- 1 .25c airmail stamp
- 2 books matches
- 1 sheet for processing Kodak Processing Kit
- Miscellaneous paint brushes in black and white cloth

In Brown Zippered Brief Case:

- 1 Brown wallet with four .15c airmail stamps (contains pad with SDBA 20 in upper left-hand)
- 10 3c stamps
- 2 1c stamps

*Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

- 1 card with words "Prince Gartner"
- 1 calling card for "Harriet Lorence"
- 1 small notebook paper
- 1 green pencil "Castell"
- 1 red plastic pencil, mechanical
- 1 circular piece of white metal similar to pulley

(1684)

- 1 Bank book for East River Savings, Balance \$1386.22
- 3 Bills from Broadway Central (Collins)
- 3 Bills from Daton Plazas (Collins)
- 7 Bills from Hotel Latham (Collins)
- 1 Bill from Fifth Avenue Laundry (Collins)
- 1 Bill from Wright Arch Preserver (Collins)
- 1 Bill—Peyton Ltd. (Collins)
- 2 empty brown paper envelopes from Manufacturers Trust Co.,

Money. (All in Brief Case)

Brown wallet in zippered brief case contains:

- 1 \$20 Bill Serial #D04553009 A (In one compartment of wallet)
- 25 \$20 Bills; and, } In main compartment of wallet
- 10 \$50 Bills }

Brown paper wrapper in zippered brief case contains \$4,000 in \$20 bills.

(1684A)

Added items

Birth Cert. Emil Robert Goldfus—#33318.

8/2/02 N. Y. County—Bor. Man.

(Ex. D—Aff—Phelan) 6/28/57

Birth Cert. Martin Collins—7/2/97.

(#32024)

*Exhibit D, Annexed to Affidavit of Rudolf I. Abel,
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(1684B)

LIST OF ITEMS TAKEN FROM WASTEBASKET.

Loose pieces of paper 1 inch by 2 inches.

Five boxes of 2-8 oz. Microdol Developer (Kodak)—full or partial.

Six books entitled, "The Penguin Hazle", "Nights of Love and Laughter", "The Ribald Reader", "A Time to Love and a Time to Die", "Three Plays", and "Paintings from the San Paulo Museum".

One box of partially used cotton buds (Johnson & Johnson.)

One can of "Acrolite".

One box of partially full Sheik prophylactics (7).

One empty bottle of "Neo-synephrin" solution, 1%.

One empty tin of "Screts".

One box with an ace bandage, 2 inch width.

One partially used tube of "Ar-ex Chap Cream".

One partially filled plastic bag of tobacco.

One empty bottle, unmarked, with Siv imprinted.

One partially filled can of Ronsonol.

One piece of garnet paper and rubbing block.

One roll of green coated wire.

Four pencils from 3 to 5 inches in length, regular lead type (one found on floor).

One pair of white cotton gloves.

One plastic spray bottle, not marked, white in color.

Two pieces of wire with green covering.

**Exhibit E, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.**

Affidavit of Joseph F. Phelan.

(1685) UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER

of

THE APPLICATION FOR SEARCH WARRANT OF ROOM 505 ON THE 5TH FLOOR OF THE BUILDING LOCATED AT 252 FULTON STREET, BROOKLYN, NEW YORK, RENTED AND OCCUPIED BY EMIL R. GOLDFUS, ALSO KNOWN AS MARTIN COLLINS.

Affidavit for
Search Warrant.

EASTERN DISTRICT OF NEW YORK, —ss.:

JOSEPH F. PHELAN, being duly sworn, deposes and says that he is a citizen of the United States, over the age of 21 years, and is a Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and upon the facts alleged herein and in the two other affidavits accompanying this application, said affidavits having been executed by Harry MacMullin and Edward A. Boyle, alleges and charges as follows:

Your deponent has been a Special Agent of the Federal Bureau of Investigation for six and one-half years, during which time and in connection with his official duties, he has from time to time been assigned to the investigation of espionage violations and as a result thereof is familiar with the techniques and methods of operation utilized in

*Exhibit E, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

the United States, and particularly in the Southern District of New York, by foreign espionage agents, including espionage agents of the Union of Soviet Socialist Republics.

On June 21, 1957, Emil R. Goldfus, also known as Martin Collins, was taken into custody by officers of the (1686) Immigration and Naturalization Service of the United States Department of Justice. At the time of the arrest of the aforesaid Emil R. Goldfus, whose photograph is attached herewith as Exhibit A and made a part hereof, certain of his property and effects were taken by the Immigration officers from the hotel room in which the arrest was made. Said effects belonging to the said Emil R. Goldfus have been examined by your deponent and included the following items:

1. A Hallicrafters short-wave radio, a photograph of which is attached hereto as Exhibit C.

2. New York State Birth Certificate Number 33318 in the name of Emil Robert Goldfus, born August 2, 1902, a copy of which is attached hereto as Exhibit D.

In the course of your deponent's investigation in this case, your deponent has seen a certified copy of New York State Birth Certificate Number 33318, issued on June 25, 1957, as a true copy of a record in the custody of Carl L. Erhardt, Director of the Bureau of Records and Statistics, Department of Health, City of New York. Said certificate is identical with the copy of the birth certificate in the name of Emil Robert Goldfus which was found among the effects of the Emil R. Goldfus, also known as Martin Collins, who was arrested by Immigration officers on June 21, 1957. Your deponent has also seen a certified copy of a Certificate and Record of Death, issued on June 25, 1957, by the Department of Health, City of New York, which reflects that Emil Goldfuss, a white male, of 120 East 87th Street, died at the age of two (1687) months and seven days on

*Exhibit E, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

October 9, 1903. The certificate of death lists the father's name as Emil Goldfuss and the mother's name as Helen Trautwein.

It thus appears that the true Emil Robert Goldfus died as an infant in 1903, and his identity has been assumed by the individual using the name of Emil R. Goldfus, also known as Martin Collins, at the time of his arrest by Immigration officers on June 21, 1957.

3. New York City birth certificate purportedly issued in the name of Martin Collins, a copy of which is attached hereto as Exhibit E.

Your deponent has been advised through a report received by the Federal Bureau of Investigation from the Immigration and Naturalization Service that, subsequent to his arrest on June 21, 1957, the said Emil R. Goldfus, also known as Martin Collins, admitted to Immigration officers that his true identity is Rudolph Ivanovich Abel, that he was born in Moscow, Russia, on July 2, 1902, and that he last entered the United States on November 15, 1948, from Montreal, Canada, using a passport received in Europe and issued in the name of Andrew Kayotis.

4. An International Certificate of Vaccination issued in the name of Martin Collins on or about May 21, 1957, a copy of which is attached hereto as Exhibit F.

5. A piece of graph paper containing eight rows of numbers, in groups of five digits, a copy of which is attached hereto as Exhibit G.

(1688) Messages of this type, using numerical code of the type apparently utilized in this document, are often used in connection with foreign intelligence activities.

6. A scrap of paper containing the following printed message: "I bought a ticket to next ship—Queen Elisabeth"

*Exhibit E, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

for next Thursday—1.31. Today I could not come because 3 men are tailing me," a copy of which is attached hereto as Exhibit H.

7. A scrap of paper containing the following handwritten note: "In Mex.: Signal 'T' on pole opposite #191 Chihnaahva (Chihvahaa) St (Fonolia Roma), using side of pole towards roadway. Sat or Sun, Tues, Thur. Met on Mon, Wed, Fri at 3 pm movie 'Balmora,' " a copy of which is attached hereto as Exhibit I; and another slip of paper containing the following typewritten message: " 'Balmora', Avenida Oberon. 3 p. m. Display left of entrance. L. 'Is this an interesting picture?' L. 'Yes. Do you wish to see it, Mr. Brandt?' L. smokes pipe and has red book in left hand," a copy of which is attached hereto as Exhibit J.

The first of the aforesaid messages apparently is an arrangement for a meeting place and the second message apparently contains a typical pre-arranged verbal exchange used to identify intelligence agents who are unknown to each other and meeting for the first time.

8. A slip of paper containing the following typewritten message: Mr. Vladinec, P. O. Box 348. M-w, K-9. USSR. Sign 'Arthur'. W. Merkulow, Poste Restante, M-a, USSR (Russia). Sign 'Jack,' " a copy of which is attached hereto as Exhibit K.

(1689) 9. A torn slip of paper containing the following message: "... will w... in London 2-3 day while your message arrives. P," a copy of which is attached hereto as Exhibit L.

10. Two wooden pencils and one mechanical pencil, which had been fashioned into "containers" of the type sometimes used by Soviet espionage agents for secreting and transmitting messages, commonly on microfilm. Photo-

*Exhibit E, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

graphs of the aforesaid pencils found in the possession of Goldfus are attached hereto as Exhibit M.

Following the departure from the hotel of Emil R. Goldfus, also known as Martin Collins, in the custody of Immigration officers on June 21, 1957, the room which had been occupied by Goldfus was inspected by agents of the Federal Bureau of Investigation, including your deponent. This inspection revealed a small wooden pencil in a waste basket. A careful examination of this pencil, a photograph of which is attached hereto as Exhibit N, revealed it to be a container similar to the type described immediately above. The chamber of this pencil container secreted at the time of its finding a number of photographic frames of microfilm with writing thereon.

Your deponent also has inspected the hotel registration card for "Martin Collins," which reflects that the said person occupied Room 839 at the Hotel Latham and checked into the hotel on May 18, 1957. Emil R. Goldfus, also known as Martin Collins, occupied Room 839 at the Hotel Latham in New York City at the time of his arrest on June 21, 1957. (A copy of the said hotel registration card for "Martin Collins" is attached hereto as Exhibit B).

(1690) From the foregoing, and from the accompanying affidavits of Harry MacMullin and Edward A. Boyle, your deponent has reason to believe and does believe that the said Emil R. Goldfus, also known as Martin Collins, has for a number of years since 1948 and continuously up until the date of his arrest on June 21, 1957, engaged in a conspiracy to violate Title 18, United States Code, Sections 793, 794, and 951, and that, in furtherance of said conspiracy, the said Emil R. Goldfus has concealed in his studio at Room 505, on the fifth floor of the building located at 252 Fulton Street, Brooklyn, New York, a shortwave radio and related radio equipment; camera equipment, including microfilm and microdot equipment; bolts, earrings, bat-

***Exhibit E, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.***

teries, cuff links, pencils and similar items which have been or are suitable to be fashioned into "containers" for the secreting and transmitting of microfilm, microdot and other secret messages; and tools with which to fashion such "containers"; and microfilm, microdot and other messages, including coded communications; and other material intended for use, or which is or has been used, as a means of committing the aforesaid crimes.

WHEREFORE, your deponent prays that a search warrant issue authorizing any Special Agent of the Federal Bureau of Investigation to enter, in the daytime, with proper assistance, Room 505 on the fifth floor of the building located at 252 Fulton Street, Brooklyn, New York, (1691) and there search for and seize and take into possession all of said articles or material found therein.

JOSEPH F. PHELAN.

Sworn to and subscribed before me }
this 28th day of June, 1957. }

WALTER BRUCKHAUSEN,
United States District Judge,
E. D. N. Y.

**Exhibit F, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.**

Affidavit of Edward A. Boyle.

(1692)

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

IN THE MATTER

of

THE APPLICATION FOR SEARCH WARRANT
OF ROOM 505 ON THE 5TH FLOOR OF
THE BUILDING LOCATED AT 252 FUL-
TON STREET, BROOKLYN, NEW YORK,
RENTED AND OCCUPIED BY EMIL R.
GOLDFUS, ALSO KNOWN AS MARTIN
COLLINS.

Affidavit for
Search Warrant

EASTERN DISTRICT OF NEW YORK, ss.:

EDWARD A. BOYLE, being duly sworn, deposes and says:

That he is a citizen of the United States and over the age of twenty-one years. That he resides in Kings County, Brooklyn, New York, and is an investigator with the United States Immigration and Naturalization Service of the Department of Justice of the United States of America.

That on Friday, June 21, 1957, at approximately 7:30 a. m. he entered Room 839 of the Hotel Latham, located at 4 East 28th Street, New York City, having in his possession an Order to Show Cause and a Warrant of Arrest in (1693) the name of Martin Collins, also known as Emil R. Goldfus. That the Order to Show Cause and Warrant of Arrest charged Martin Collins, also known as Goldfus, with entering the United States somewhere along the Cana-

*Exhibit F, Annexed to Affidavit of Rudolf I. Abel,
in Support of Motion.*

dian border in 1949 in violation of law. That upon entering the room, he asked the individual therein his name. That the individual replied: "Martin Collins." That he informed "Collins" he was under arrest for violation of the Immigration Laws of the United States and thereupon served "Collins" with the Order to Show Cause. That "Collins" was requested to and did sign the original Order to Show Cause. That he served a copy of the said Order to Show Cause and a Warrant of Arrest, which warrant was endorsed by him as having been served at 7:35 a. m. on June 21, 1957.

That immediately following the service of the Warrant of Arrest, he went to the clothes closet in "Collins' " room and started to search his effects which were contained therein. That during this search, in a valise he observed a wallet and thereupon he searched the same. That among the items which he found in the wallet were several slips of paper, two being typewritten and one handwritten. That the handwritten note made reference to a symbol appearing on a pole opposite an address and set forth the time and place of (1694) a meeting. That one of the typewritten notes contained a question relating to a picture and a response relating to a pipe and book. That the other typewritten note contained the names of two individuals having addresses in the USSR.

That among "Collins'" effects was a clothing store bill in the name of Mr. Goldfus. That he then asked "Collins" who Goldfus was, and "Collins" replied: "That's me." That included in the effects in the closet was a camera bag which, when opened, contained a camera, numerous lenses, and other photographic equipment, such as film. That all of the said effects seized in "Collins'" room were displayed to Special Agents of the Federal Bureau of Investigation and transported to Immigration and Naturalization Headquarters, New York City.

***Answering Affidavit of Kevin T. Maroney,
in Opposition to Motion to Suppress.***

That he observed on a small table beside the bed, a Hallierafters radio having a gray metal cabinet and short-wave band. That this radio was equipped with an aerial which ran up the wall of the room, across the ceiling, into the bedroom, and out the bedroom window.

That present with him at the time of the arrest were Edward J. Farley, Robert Schoenberger, and Lennox Kanzler of the United States Immigration and Naturalization Service, who aided him in the search of the effects of Emil R. Goldfus.

EDWARD A. BOYLE.

Sworn to and subscribed before me }
this 28th day of June, 1957. }

WALTER BRUCHHAUSEN,
United States District Judge,
E. D. N. Y.

***Answering Affidavit of Kevin T. Maroney, in
Opposition to Motion to Suppress.***

[SAME TITLE.]

(1696)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

KEVIN T. MARONEY, being duly sworn, deposes and says on information and belief:

I am a Special Attorney of the United States Department of Justice assigned to assist in the prosecution of Rudolf Ivanovich Abel, the Petitioner herein, who was

*Answering Affidavit of Kevin T. Maroney,
in Opposition to Motion to Suppress.*

indicted on August 7, 1957, by a Grand Jury sitting in the United States District Court for the Eastern District of New York on charges of conspiracy to commit violations of the Espionage Laws of the United States, and I am fully familiar with all the facts concerning this case.

PERTINENT FACTS

In the affidavit of James B. Donovan, annexed to and in support of Petitioner's motion for an order directing the return of and the suppression for use as evidence of any and all property seized from the petitioner in Room 839 of the Hotel Latham, 4 East 28th Street, New York, New York, the affiant declares that such property was seized illegally without warrant, contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

(1697) The affiant alleges that "prior to June 21, 1957 (and probably for a considerable period of time) the F. B. I. believed that a Soviet spy named Abel, with the high rank of 'Colonel', was living in Room 839 of the Hotel Latham in this District under the name of 'Martin Collins' ". The affiant further alleges that "sometime prior to June 21, 1957, the Department of Justice, believing Abel to be a spy, had to make a decision with respect to him". One of two alternatives, it is said, had to be made: either to arrest Abel on charges of espionage and conduct any lawful search and seizure, or to seize Abel, conceal his detention, and "seek to induce him to come over to our side". The choice between such alternate courses of action is an inaccurate estimation of the situation which confronted the Government on June 21, 1957.

In May of 1957, information reflecting possible espionage activity on the part of Abel (known then only by the cryptonym "Mark") was first brought to the attention of the Department of Justice. The Federal Bureau of Investigation immediately conducted an intensive investigation of

*Answering Affidavit of Kevin T. Maroney,
in Opposition to Motion to Suppress.*

Abel and his alleged espionage activities, and the results thereof were furnished to the Internal Security Division.

Review of the evidence thus developed resulted in the conclusion that Petitioner had conspired to violate the Espionage Statutes. On June 18th and 19th, 1957, two attorneys of the Internal Security Division interviewed the principal witness in this matter. Although this witness had already furnished and was willing to continue to furnish, on a confidential basis, information from a counter-espionage viewpoint, he absolutely refused to agree to testify in any public proceeding for fear of reprisals that he claimed (1698) would be taken by the U. S. S. R. against his mother, brothers, and sister, who were and are in the Soviet Union.

Because of the refusal of this witness (who was, of course, a co-conspirator of the Petitioner and thus could invoke his privileges under the Fifth Amendment if called to testify against his will), the Internal Security Division concluded on June 19, 1957 that the *available* evidence was insufficient to secure a warrant on complaint, or to secure an indictment on charges of conspiracy to violate the Espionage Statutes. (Had the witness been willing to testify, the Internal Security Division and the Federal Bureau of Investigation were prepared as of June 19, 1957, and fully intended, to take the necessary legal steps to secure a warrant and effect the arrest of Petitioner on espionage charges.)

Thus, on June 19, 1957 the Department of Justice had information that a Soviet National was in the United States illegally and was heading up a Soviet espionage apparatus. The Department was unable to proceed under the Espionage Statutes, but could proceed under the Immigration Laws. The duty and obligation to do so seems to us clear. Accordingly, Petitioner was arrested on June 21, 1957 under an Alien Warrant and was served with an Order to Show Cause duly issued by the Acting District Director of Immigration and Naturalization Service in New York City.

*Answering Affidavit of Kevin T. Maroney,
in Opposition to Motion to Suppress.*

Because of his alleged position as a Colonel in the Soviet State Security Service, he was moved on the same date from New York City to the Alien Detention Facility at McAllen, Texas, which is the maximum security detention facility of the Immigration and Naturalization Service.

(1699) Following Abel's arrest by the Immigration and Naturalization Service, the Federal Bureau of Investigation continued to investigate him in connection with his alleged espionage activity. Subsequent to June 21, 1957 additional evidence became available and the previously reluctant witness decided to testify. The matter was presented expeditiously to a Grand Jury and on August 7, 1957 a Federal Grand Jury in the Eastern District of New York returned a three-count indictment, charging Abel in Count One, with a conspiracy to commit a violation of Section 794(a) of Title 18 United States Code, in Count Two, with a conspiracy to violate Section 793(c) of Title 18 United States Code, and, in Count Three, with a conspiracy to violate Section 951 of Title 18 United States Code, in violation of Section 371 of Title 18 United States Code.

PETITIONER'S ALLEGATIONS.

In Petitioner's affidavit, annexed to and in support of the present motion for the return and the suppression for use as evidence of any and all property seized from him at the Hotel Latham, many rebuttable facts are alleged. In this affidavit, an attempt is made to controvert only some of those allegations which the Petitioner seems to believe to be significant and relevant to the instant proceeding.

At approximately 7:00 A. M. on Friday, the 21st day of June, 1957, Special Agents of the Federal Bureau of Investigation knocked on the door of Room 839 in the Hotel Latham and asked for Martin Collins. When Petitioner opened the door, two Special Agents entered, without

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in Opposition to Motion to Suppress.*

using force or meeting resistance, and identified themselves. Later, a third Special Agent joined them. At this meeting with the (1700) Petitioner, during which he was addressed as "Colonel" only twice, Special Agents informed him that the Federal Bureau of Investigation had become aware of his activities, but no mention was made about Special Agents following Petitioner, nor was he told that the Federal Bureau of Investigation knew all about his "agents". He was urged to "cooperate" by answering questions put to him by the Special Agents.

At about 7:30 A. M., two Investigators of the United States Immigration and Naturalization Service entered Petitioner's room, identified themselves, and arrested him under authority of an Alien Arrest Warrant. At the same time Petitioner was served with an Order to Show Cause charging him with illegal entry into the United States and failure to notify the Attorney General of his address in compliance with Section 265 of the Immigration and Nationality Act. Service of these papers was acknowledged in writing by the Petitioner in the space provided for this purpose on the reverse side of the Order to Show Cause. This document, a copy of which the Petitioner possessed at all times subsequent to his arrest and prior to his deportation hearing, clearly apprised him of his right to be represented in his deportation proceeding by an attorney or other representative authorized to practice before the Immigration and Naturalization Service. In addition, Petitioner was orally advised at the time of his arrest that he had a right to counsel.

Immediately subsequent to and as an incident to the arrest by Immigration officials, a search of Petitioner's personal effects was conducted exclusively by Immigration officials, although Special Agents of the Federal Bureau of Investigation were present during the search. (1701) Thereafter, Petitioner and his baggage were taken to Immigration Headquarters at 70 Columbus Avenue, New

*Answering Affidavit of Kevin T. Maroney,
in Opposition to Motion to Suppress.*

York City, and a more thorough search of his effects was conducted, again by Immigration officials.

Subsequently, at about 4:15 P. M., Petitioner departed by air from New York City for McAllen, Texas, via Mobile, Alabama. Shortly after take-off from Mobile, at about 12:30 A. M. on the 22nd day of June, Petitioner was permitted to and did fall asleep on a sofa couch, which was provided in the airplane. He did not awaken until around 4:30 A. M. when the plane landed at Brownsville, Texas. He was then transported by automobile to McAllen, Texas, where he arrived at 5:31 A. M., at which time he was directed immediately to his sleeping quarters.

At McAllen, he was not quartered in what is commonly referred to as "solitary confinement", although he was segregated from the other inmates of the detention facility. He was given his choice of food, whereas other inmates were fed a standard daily diet. His quarters possessed private toilet and bathing facilities.

At no time prior to June 24, 1957, and particularly not on the morning of June 22nd, did Petitioner request a lawyer from Immigration officials. In fact, on the morning of June 22nd, Petitioner was asked by interviewing Immigration officials whether he fully understood the Order to Show Cause which was served upon him at the Hotel Latham, a copy of which Petitioner possessed at all times, and he replied "Yes". It was again pointed out to him that he had the right to an attorney, but he requested no assistance.

On Sunday, the 23rd day of June, Petitioner was not interviewed "in relays" by "separate teams" of Federal (1702) Bureau of Investigation Agents and Immigration officials. Special Agents interviewed Petitioner from 10:00 A. M. to 12:30 P. M., and from 1:30 P. M. to 4:00 P. M. Immigration officials talked with Petitioner for less than ten minutes on this day.

On Monday, the 24th day of June, the "same procedure" as took place on the 23rd day of June, was not

*Answering Affidavit of Kevin T. Maroney,
in Opposition to Motion to Suppress.*

repeated. Petitioner was interviewed in the morning by Immigration officials, and at 11:45 A. M., after carefully studying a pamphlet setting forth the law governing his status as an alien in this country for forty-five (45) minutes, he stated that his true name was Rudolf Ivanovich Abel; that he was a citizen of Russia; and that he entered the United States illegally in 1948. During this entire day, Petitioner was interviewed by Special Agents of the Federal Bureau of Investigation for a period of seven minutes from 1:45 P. M. to 1:52 P. M.

At 2:10 P. M., on the 24th day of June, Petitioner was again reminded by Immigration officials that he could have any attorney of his choice or could communicate with anyone. Petitioner said he did not know any lawyers except one named "Abt" or "Apt", who was in New York City. Petitioner first stated he intended to write "Abt" or "Apt" a letter, but then changed his mind, saying he doubted that the attorney would come to Texas. Petitioner was then given a classified phone directory containing the names of all the attorneys in the area surrounding McAllen, from which he selected the law firm of Stofford, Atlas and Spilman of McAllen. At 3:45 P. M., on the 24th day of June, Petitioner conferred for about thirty (30) minutes with an attorney from the above-mentioned firm, and this attorney tentatively agreed to represent him.

(1703) Around 9:40 A. M., on the morning of June 25th, Petitioner was notified that he had a right to an immediate hearing on the deportation charge, without waiting for a 30 day delay. Petitioner stated he had no objection to an immediate hearing, but would be bound by what his attorney advised. Petitioner's attorneys were notified, and they agreed to an immediate hearing. At 3:00 P. M., attorneys conferred with Petitioner for about forty-five (45) minutes, and they agreed that a hearing should be scheduled for the 27th day of June. A hearing was held on this date, and Petitioner again admitted his true identity was Rudolf

***Reply Affidavit of James B. Donovan,
in Support of Motion to Suppress.***

Ivanovich Abel; that he was a national of Russia; and that he was a deportable alien.

From June 27th until August 7th, the day on which Petitioner was indicted on charges of conspiracy to commit espionage and ordered removed to New York City under authority of a bench warrant issued upon the indictment, Petitioner remained in custody at the Immigration Detention Facility at McAllen, detained pursuant to provisions of Section 1252, Title 18 United States Code.

• KEVIN T. MARONEY

Sworn to before me this
day of September 1957.

}

***Reply Affidavit of James B. Donovan,
in Support of Motion to Suppress.***

[SAME TITLE.]

(1705)

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss:

JAMES B. DONOVAN, being duly sworn, deposes and says:

I am attorney for the petitioner in this proceeding and this affidavit is submitted in reply to the affidavit of Kevin T. Maroney, dated September 20, 1957, submitted by the prosecution in opposition to the moving papers.

I have reviewed the affidavit of Mr. Maroney and have compared it with the affidavits and exhibits previously submitted by petitioner in support of this motion. It is my conclusion that while there are understandable variances in details, no dispute exists between the parties with respect

*Reply Affidavit of James B. Donovan,
in Support of Motion to Suppress.*

to the material facts pertinent to this proceeding under Rule 41(e).

Accordingly, for purposes of this motion defense (1706) counsel accept the factual statements set forth in the affidavit of Mr. Maroney and the other Government affidavits annexed as Exhibits to the moving papers. To the extent of any seeming conflict on any specific fact, we request that this Court determine the legal issues upon the basis of the facts set forth in the Government's affidavits.

This of course does not accept any argumentative conclusions or opinions set forth in Mr. Maroney's affidavit. For example, as to the true meaning and significance of what happened, the Court is respectfully referred to the virtually official "The FBI Story" by Whitehead (Random House, N. Y., 1956). The Foreword is by J. Edgar Hoover, Director, Federal Bureau of Investigation, who states therein that (a) the F. B. I. has "complete confidence in his (the author's) integrity, ability and objectivity", and (b) "the facts reported are supported by the Bureau's record".

In "The F. B. I. Story", at page 339 (Footnote 2 of the Section "The Enemy Within") the author states:

"The FBI conducts two types of security investigations—one to uncover admissible evidence to be used in the prosecution of an individual or group in federal court, the other for intelligence purposes only. The intelligence investigation is intended to identify and determine the activities of individuals who are potentially dangerous to the nation's security, thereby supplying information on which to base preventive or counterespionage action. Often clandestine methods are necessary to uncover clandestine operations, as for example, obtaining an espionage agent's diary or secret papers. The evidence in the diary may be inadmissible in federal

*Reply Affidavit of James B. Donovan,
in Support of Motion to Suppress.*

court, but it may contain information which would enable (1707) the United States to protect itself at a later date. This is in contrast to a case where legal evidence, admissible in court, has to be obtained to convict the espionage agent of violating the laws of the United States."

It is evident that in this case the F. B. I.'s principal objective, on the morning of June 21st, was to capture a suspected Soviet espionage agent, with any spy paraphernalia evidencing his guilt; seek to hide the arrest and persuade him to cooperate with the United States in counter-espionage; and the latter objective failing, to use any seized evidence in prosecuting him for the crime of espionage. The result is that in this case the Government does not have, in Mr. Whitehead's words, "admissible evidence to be used in the prosecution of an individual or group in federal court".

JAMES B. DONOVAN

Sworn to before me this 23rd }
day of September, 1957. }

MINNIE E. McINTURFF

Notary Public, State of New York

No. 31-2492175

Qualified in New York County

Commission Expires March 30, 1959

**Supplemental Affidavits in Opposition to
Motion to Suppress.**

Affidavit of Robert E. Schoenenberger.

[SAME TITLE.]

(1242) DISTRICT OF COLUMBIA—SS.:

ROBERT E. SCHOENENBERGER, being duly sworn, deposes and says:

I am a Supervisory Investigator for the Immigration and Naturalization Service, United States Department of Justice, Washington, D. C. I reside at 2920 Peabody Street, Hyattsville, Maryland.

On June 21, 1957, while in the exercise of my official duties in connection with the arrest of Rudolf Ivanovich Abel, at the Latham Hotel, New York, New York, I entered room 839 of this hotel at approximately 7:30 A. M., for the purpose of supervising the arrest of Abel and the examination of his personal effects in an effort to locate documentary evidence of alienage.

In the course of carrying out this arrest and examination, the personal belongings of Abel were packed into suitcases by myself and three other investigators of the Immigration and Naturalization Service.

At the completion of this packing, Abel requested permission to re-pack one of the larger bags for the purpose of transferring material from a camera case to the bag. This permission was granted (1243) and during the course of his re-packing the bag he was observed by me in the act of removing some papers from the bag and attempting to slip them inside the right hand sleeve of the jacket he was wearing. I removed these papers from Abel's possession and instructed him to not take anything else from the bag.

I then placed these pieces of paper in my coat pocket where they remained until I arrived at the New York District Office of the Immigration and Naturalization Service, 70 Columbus Avenue, New York City, at which time

*Supplemental Affidavit of Edward J. Farley,
in Opposition to Motion.*

they were returned by me to the bag from which they were taken.

ROBERT E. SCHOENENBERGER

Sworn to before me this 25th }
day of September, 1957. }

EMILY MCC. IRELAND
Notary Public
District of Columbia
My commission expires
Feb. 28, 1959

Affidavit of Edward J. Farley.

[SAME TITLE.]

(1245)

STATE OF NEW YORK }
COUNTY OF KINGS } ss.:

EDWARD J. FARLEY being duly sworn deposes and says:

I am a Supervisory Investigator for the United States Immigration and Naturalization Service of the Department of Justice, and have been employed by this service for approximately sixteen years.

On June 20, 1957, in connection with the performance of my official duties, I was advised by my superiors at the Immigration and Naturalization Service, that information had been received from the Federal Bureau of Investigation concerning the presence in New York City of a Soviet espionage agent who had illegally entered the United States. I was informed that this individual was an alien and a Russian national who held the rank of Colonel in the State Security Service of the Union of Soviet Socialist Republics.

*Supplemental Affidavit of Edward J. Farley,
in Opposition to Motion.*

I was further informed that this alien was presently engaged in espionage activity directed against the United States, that he had (1246) entered the United States in 1949 at an unknown point along the Canadian border, that he used the aliases Martin Collins and Emil R. Goldfus, and that he was at that time registered at the Hotel Latham, 4 East 28th Street, New York City, under the name of Martin Collins.

A short period of time before 7:30 A.M., in accordance with instructions received from my superiors at the Immigration and Naturalization Service, I proceeded to the Hotel Latham. I was accompanied by Edward A. Boyle, also an Investigator with the Immigration and Naturalization Service. Boyle had in his possession an Order To Show Cause and Warrant of Arrest in the name of Martin Collins, also known as Emil R. Goldfus. The Order To Show Cause and Warrant of Arrest charged Martin Collins, also known as Emil R. Goldfus, with entering the United States at a point somewhere along the Canadian border in 1949, in violation of law. Boyle and I entered the Hotel Latham and proceeded to the vicinity of Room 839, which was the room in which we had been informed Collins was staying. At about 7:30 A.M. Special Agents of the Federal Bureau of Investigation entered Room 839. Approximately ten minutes later, the Special Agents departed from 839 and Boyle and I entered for the purpose of arresting the alien.

Upon our entry I observed a man sitting on the bed with his elbows on his knees, and his chin in his hands. He was dressed only in undershorts. Boyle and I identified ourselves to this individual and exhibited our credentials. Boyle asked the man his name and he answered "Martin Collins." Boyle then read to him the charges contained in the Order To Show Cause, after which he served Collins with a copy of the Order and requested him to endorse an admission of service on the original Order. Collins com-

*Supplemental Affidavit of Edward J. Farley,
in Opposition to Motion.*

plied with this request and Boyle then served him with a copy of the Warrant of Arrest.

(1247) After the Order and Warrant were served, I searched Collins' person to see if he was in possession of any weapon or instrumentality which could be used either to harm the arresting officers or to inflict injury to his own person. This practice is customary with me, as well as with other law enforcement officers. It is a precautionary measure to insure the safety of the officers, as well as the arrested party.

Shortly after the arrest Boyle and I were joined in the room by two other Investigators of the Immigration and Naturalization Service, Robert E. Schoenenberger, and Lennox F. Kanzler. These two men, as well as Boyle and I, commenced to search the personal effects of the alien, in an effort to discover any items or documents which would reflect upon the identity and nationality of the individual arrested. This is customary practice when aliens are arrested by Immigration and Naturalization Service officials on charges similar to those which led to this arrest.

Throughout the time Boyle and I were in Room 839, we continued to take precautions to insure the well being of ourselves and the alien. After the arrest I inquired of Collins as to which of his suits he desired to wear. He selected a particular gray suit, and Boyle and I searched the coat and trousers. We also searched the other items of clothing before they were put on by the alien.

At one point, while Boyle was searching the effects of the alien, he encountered a store bill in the name of a Mr. Goldfus. Boyle inquired who Mr. Goldfus was and Collins replied "that's me."

After the alien was fully dressed, I started to pack his belongings in his suitcases. I asked the alien whether there was anything in his room which he did not own, and he replied in the negative. I therefore started packing everything into his suitcases. The alien became (1248) displeased as to the manner in which I had packed his belong-

*Supplemental Affidavit of Edward J. Farley,
in Opposition to Motion.*

ings, and therefore requested permission to repack. This permission was granted, and he started to fold each item of clothing carefully and place them in his suitcases. He also placed his other belongings carefully in his suitcases. While he was packing, he at times would pick up objects which were lying about in the room and cast them into a waste basket. By the time he finished packing, the waste basket contained quite a few discarded items and was about half filled.

While Collins was packing I asked him if he owed the hotel any money. He said that his bill amounted to a little over \$20.00. I then turned to a Special Agent of the Federal Bureau of Investigation who was outside of the room but within hearing distance, and told him to contact the Desk Clerk and have a bill prepared. A short time later the Special Agent returned with the bill. Collins was shown the bill and he paid it in cash. The Special Agent then took the money to the hotel management.

After the alien had finished packing his belongings in the manner desired by him, I, and the other Immigration and Naturalization Service officials accompanied him out of the hotel. We transported him in a vehicle belonging to our service to Immigration and Naturalization Service Headquarters at 70 Columbus Avenue. I drove the automobile, and the alien sat with Boyle in the back seat. Kanzler and Schoenenberger were in the front seat with me, and, as is our ordinary practice in such cases, the alien's belongings were transported with him.

EDWARD J. FARLEY

Sworn to before me this }
day of September, 1957. }

ROBERT S. KREINDLER

Notary Public, State of New York

No. 24-2198700

Qualified in Kings County

Commission Expires March 30, 1959

**Supplemental Affidavit of James P. Kehoe,
in Opposition to Motion.**

[SAME TITLE.]

(1250)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES P. KEHOE being duly sworn deposes and says:

I am a Special Agent of the Federal Bureau of Investigation and have held such position for the past six and one-half years.

On June 21, 1957, in connection with the performance of my official duties, I had occasion to be at the Hotel Latham which is located at 4 East 28th Street, New York City. The Federal Bureau of Investigation had been informed by the Immigration and Naturalization Service of the Department of Justice, that officials connected with that service were on this date prepared to arrest an alien who was registered in Room 839 at the Hotel Latham under the name of Martin Collins.

While on the eighth floor of the hotel and in the vicinity of Room 839, I observed officials of the Immigration and Naturalization Service depart from Room 839. They had in their custody an individual known to me as Martin Collins, also known as Emil R. Goldfus. This occurred at about 8:30 A. M.

(1251) A short time after the aforementioned persons had left Room 839 I contacted the manager of the Hotel Latham, Mr. Nat Wilson. Mr. Wilson informed me that Martin Collins had checked out of the hotel and had paid his bill in full. I requested Mr. Wilson to sign a Consent authorizing me and certain other Special Agents of the Federal Bureau of Investigation to search the room which had been vacated by Martin Collins. At about 9:00 A. M. Mr. Wilson executed the Consent to Search. Mr. Wilson then

***Supplemental Affidavit of James B. Donovan,
in Support of Motion.***

expressed a desire to inspect Room 839 since Martin Collins, his former guest, had vacated the room. Mr. Wilson thereafter visually inspected the room from the doorway. He touched nothing in the room and completed his inspection from just inside the hallway door.

At about 9:15 A. M. I began to search Room 839 and was assisted in this task by Special Agents Robert J. Beatson and Thomas J. Green, Jr. We completed our search at approximately 12:15 P. M., and then vacated the room and closed the door.

JAMES P. KEHOE

Sworn to before me this
day of September 1957

}

GERALDINE H. MEYER
NOTARY PUBLIC, State of New York
No. 24-2880758

Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1959

**Supplemental Affidavits in Support of Motion
to Suppress.**

Affidavit of James B. Donovan.

[SAME TITLE.]

(1258)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES B. DONOVAN, being duly sworn, deposes and says:

I was assigned as chief counsel for Rudolf Ivanovich Abel, the defendant, by the Hon. Matthew T. Abruzzo on August 20, 1957.

***Supplemental Affidavit of Rudolf Ivanovich Abel,
in Support of Motion.***

The principal issue of fact created by the opposing affidavits of the defendant and the Government in the defendant's motion to suppress as evidence property belonging to him and seized at the Hotel Latham on June 21, 1957 is as follows:

The defendant maintains that the true objective of the Department of Justice in conducting the search and seizure at the Hotel Latham on June 21, 1957 was to obtain any espionage material possessed by a suspected Soviet agent in Room 839;

The Government, in the affidavits most recently submitted in its behalf, apparently denies this contention.

JAMES B. DONOVAN

JAMES B. DONOVAN

Sworn to before me this
day of October, 1957.

}

MINNIE E. MCINTURFF
Notary Public, State of New York
No. 31-2492175
Qualified in New York County
Commission Expires March 30, 1959

Affidavit of Rudolph Ivanovich Abel.

[SAME TITLE]

(1260)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RUDOLF IVANOVICH ABEL, being duly sworn, deposes and says:

I am the defendant named in the indictment herein. I was arrested in Room 839 of the Hotel Latham, 4 East 28th

*Supplemental Affidavit of Rudolf Ivanovich Abel,
in Support of Motion,*

Street; New York, New York, on June 21, 1957. At the time of my arrest a search was conducted of my room by officers of the Immigration and Naturalization Service. All items seized in the room at that time belonged to me.

I have been informed that subsequent to my departure in the custody of the Immigration and Naturalization Service officers another search was conducted of my room at the Hotel Latham by agents of the Federal Bureau of Investigation, and that certain items were found in the wastebasket of that room. All such items also belonged to me and it was not my intention to abandon them when I was taken from my room in handcuffs by the Immigration officers.

Prior to my being taken from the room on June 21, at the request of an officer of the Immigration and Naturalization Service, the hotel management submitted a bill for my occupancy of Room 839, which was paid out of funds belonging to me. On the basis of the amount charged in such bill, which was approximately \$25, or rental for six days, I was entitled to remain in Room 839 until check-out time on June 21 which, on information and belief, was sometime in the afternoon. If I had not been forcibly removed from my room on the morning of June 21, it was my intention to remain there at least for the remainder of that day and for an indefinite period thereafter.

RUDOLF IVANOVICH ABEL

RUDOLF IVANOVICH ABEL

Sworn to before me this 9th }
day of October, 1957. }

JOHN R. SCOTT,
Deputy Clerk,

U. S. District Court, E. D. N. Y.

**Supplemental Affidavit of Arnold Guy Fraiman,
in Support of Motion.**

[SAME TITLE.]

(1263)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

ARNOLD GUY FRAIMAN, being duly sworn, deposes and says:

I was assigned as associate trial counsel for Rudolf Ivanovich Abel, the defendant herein, by the Honorable Matthew T. Abruzzo on August 29, 1957.

This afternoon, in the course of concluding my research on the defendant's motion to suppress evidence seized at the Hotel Latham on June 21, 1957 your deponent was informed that Lt. Gen. Joseph M. Swing, Commissioner of Immigration, had made a statement to the press on August 11, 1957 concerning the circumstances surrounding the arrest of the defendant on June 21. The substance of General Swing's remarks are contained in an article appearing on page 1 of the New York Herald Tribune of August 12, 1957. A copy of that article is annexed hereto as Exhibit A. In this article General Swing is quoted as saying that the arrest of the defendant by immigration authorities was made at the specific request of "several government agencies." Further General Swing indicated that Abel would not have been (1264) arrested by immigration officials on June 21 if American counter-intelligence had not requested it.

Richard C. Wald, author of the article, was communicated with; he consented to sign an affidavit attesting to the truth and accuracy of the article in reporting the statements made to him by General Swing, but counsel to the newspaper have refused to permit it "as a matter of policy." Your deponent also communicated with the city desk editor of the Herald Tribune and was informed that

***Exhibit A, Annexed to Supplemental Affidavit of
Arnold Guy Fraiman, in Support of Motion.***

subsequent to the appearance of the article, no one has questioned the accuracy of the matter quoted therein.

In the event that the Government questions the accuracy of the Herald Tribune article; the defendant would have no objection to their submitting an affidavit by General Swing denying the truth of the quoted matter attributed to him therein, or their requesting that the hearing be reopened to have General Swing testify.

ARNOLD GUY FRAIMAN

ARNOLD GUY FRAIMAN

Sworn to before me this 10th }
day of October, 1957. }

MINNIE E. MCINTURFF

Notary Public, State of New York.

No. 31-2492175

Qualified in New York County

Commission Expires March 30, 1959

**Exhibit A, Annexed to Affidavit of Arnold
Guy Fraiman.**

**Article Appearing on Page 1 of the New York
Herald Tribune of August 12, 1957.**

(1265)

SPY HUNTERS HAD EYE ON ABEL A YEAR

ARREST MADE AT THEIR REQUEST

By RICHARD C. WALD

The immigration authorities' arrest of alleged master spy Rudolf Ivanovich Abel was made at the specific request of "several government agencies," it was revealed yesterday by Lt. Gen. Joseph M. Swing, Commissioner of Immigration.

*Exhibit A, Annexed to Supplemental Affidavit of
Arnold Guy Fraiman, in Support of Motion.*

"We were well aware of what he was when we picked him up," Gen. Swing said. "Our idea at the time was to hold him as long as we could."

Gen. Swing indicated that Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it. The commissioner said he could not comment, however, on which agencies provided the information or asked for the arrest. In all cases, it is standard Immigration Service procedure to notify all government intelligence agencies of a pending arrest before it is made, he said.

FOLLOWED FOR YEAR

Conceivably, the immigration officials were called in as a device to arrest Abel while preserving as much secrecy as possible concerning how much the government knew about his activities for Russia. The agencies, probably the Federal Bureau of Investigation and the Central Intelligence Agency, had followed Abel for a year and undoubtedly knew whether he planned to skip the country. They might have wanted a chance to search his effects thoroughly without tipping their hand.

"We sent him to our maximum security installation at McAllen, Texas, immediately because of the information we had on him," Gen. Swing said.

In Texas, Abel was apparently aware that he was suspected of more than mere evasion of the immigration laws. The attorney he hired to represent him, Morris Atlas, of the law firm of Stafford, Atlas & Stillman, in McAllen, reported yesterday that "Abel himself said there might be other charges, but he wouldn't tell us what they were."

FAILED TO REGISTER

At a hearing a week after his arrest, it transpired that the fifty-five-year-old Moscow-born defendant was guilty

*Exhibit A, Annexed to Supplemental Affidavit of
Arnold Guy Fraiman, in Support of Motion.*

of two deportable offenses—he had entered the country illegally from Canada in 1948, and he had failed to register as an alien.

But even though he refused to protest the proceedings or give any aid to his attorney in defending him, Abel stood little chance of being deported. Gen. Swing pointed out that “under the law he could be kept here for six months after the hearing pending any other action the government might take, and of course we were holding him in the hope that sufficient evidence could be gathered to indict him.”

Mr. Atlas, who said Abel paid in full for the legal services given him, also said that he had not been able to find out what the original charges were that brought the Immigration Service into the case.

NINETEEN “OVERT ACTS”

Some of those charges were undoubtedly prepared by Reino Hayhanen, a former lieutenant colonel of Soviet intelligence, who had allegedly worked with Abel and recently defected to the West. Hayhanen is named in all but two of nineteen “overt acts” mentioned in the indictment handed up last Wednesday. The information concerning several of these could only have come from Hayhanen or Abel. Hayhanen is reportedly in secret Federal custody. One of the minor mysteries of the case is: which Federal agency has Hayhanen?

The indictment alleged that the thin, mild-mannered Russian masqueraded for the last four years as an artist and photographer in a studio at 252 Fulton St., Brooklyn, which actually was the center of a spy net conspiring to gather and transmit to Moscow information concerning national defense “and particularly information relating to arms, equipment and disposition of United States armed forces, and information relating to the atomic energy program of the United States.”

*Exhibit A, Annexed to Supplemental Affidavit of
Arnold Guy Fraiman, in Support of Motion.*

Abel was said to have been a member of the Soviet Intelligence network since 1927, and to have been educated as an electrical engineer. He is said to have a wife and two children in Russia. He is the highest ranking Soviet spy ever accused here.

UNDER STRONG GUARD

Yesterday, in continuation of the maximum security precautions that have surrounded him since he was arrested, Abel was confined in the Federal Detention Headquarters at 427 West St., where special precautions were taken to prevent him from committing suicide.

Officials at the headquarters refused to divulge any information about their prisoner. He had no visitors over the week end, however.

The Soviet Embassy in Washington, taking the traditional attitude of a government embarrassed by apprehension of an intelligence agent, has left the case to be treated as an internal concern of the United States.

Also, Abel has not yet arranged an attorney for his forthcoming trial. He has asked that John J. Abt, sometime attorney for the Communist party, represent him, but Mr. Abt has said he doesn't know whether previous commitments will allow him to take the case.

Mr. Abt was on his way to New York from Maine, yesterday, and has said he will see Abel today, if Abel still wants to see him. He said Friday that he never heard of Abel before, and Abel told local Federal officials that he wanted a lawyer named Abt, whose first name he couldn't recall. But in McAllen, when he was first arrested, Abel was a good deal more certain. Then he said he wanted "a lawyer named John Abt" whom he knew could be found in the Manhattan phone book.

The trial will probably be held sometime late next month.

New York Herald Tribune

August 12, 1957.

Excerpts From Transcript of Hearing on Motion to Suppress.

(1268) The Court: Gentlemen, before we begin this formal hearing, I observe at page 21 of Government's brief, filed in the Southern District, a reference to the various articles concerning which this motion is made.

I think they are more clearly shown in a schedule which is attached to the affidavit of Mr. Donovan, verified September 13th.

I am wondering if before we proceed to the hearing, and without reference to any issues of law which it presents, there could be an arrangement between counsel whereby on the request of the defendant certain of the articles, such as matters of wearing apparel and so on, could be agreed to, be surrendered to him, not pursuant to this motion, but to avoid including in the motion everything that is embraced (1269) in the schedule, which shows, I think, thirty-eight separate articles.

Do I make the suggestion clear?

Mr. Maroney: Yes, sir.

As a matter of fact, your Honor, we have orally advised counsel for the defendant that we are willing to return the bulk of the material involved here.

Now, we did that about two weeks ago by telephone and we were advised in response that they would just as soon have us retain this material because of their own storage problem.

There are only about sixteen items on this schedule that the Government lays claim to and the other material we have no objection to returning and we stand now ready to return it to the defendant.

The Court: What do you say, Mr. Donovan?

Mr. Donovan: That is correct, your Honor.

In other words, there are various articles here which are wholly unrelated to the case and it has simply been a question of whether we could conveniently go up there, obtain them, bring them back, where to store them and so

Excerpts of Hearing on Motion to Suppress.

on; but insofar (1270) as many of these articles are concerned which they have no use for as evidence, there is no dispute between the government and ourselves.

The Court: Well, if we can agree that in this schedule of thirty-eight articles, only those to be indicated are deemed to fall within the motion, I think that that would simplify matters.

Mr. Donovan: Your Honor, I believe that we can agree upon what are the items in dispute.

There are, I believe—

The Court: Well, I am going to ask you to bear with me for a minute.

I would like to take them off this list.

I would like to take and strike the ones off the list that are not in dispute.

Mr. Donovan: Very well, your Honor.

Mr. Maroney: Perhaps, would your Honor like us to state the items that we do lay claim to here?

The Court: I don't care how you do it, as long as I get the undisputed items off this schedule. That is all.

I want to make it quite clear that those undisputed items are not deemed to be embraced in (1271) the motion.

Mr. Donovan: Yes, sir.

The Court: They are not deemed turned over pursuant to the motion, they are being turned over because they are not included in it.

Mr. Maroney: Yes, sir.

The Court: Suppose you give me the ones that are deemed to be within the motion.

Mr. Maroney: Item No. 3, your Honor, is within the motion.

The Court: Then that means that 1 and 2 are not?

Mr. Maroney: One and two are not.

The Court: Three is within, one and two are not.

Next?

Mr. Maroney: Number four is within.

Number six is within.

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The Court: That means that Number five is not?

Mr. Maroney: Number five is not.

The Court: This is all agreed to?

Mr. Maroney: Yes, sir.

Mr. Donovan: Yes, sir, your Honor.

(1272) The Court: As I understand it, you are selecting the items which are relevant to the case and the others are irrelevant?

Mr. Maroney: The others we make no claim as a result of such.

The Court: Take out number five, is that right?

Mr. Maroney: Yes.

Number six and number seven are within.

The Court: What about number eight?

Mr. Maroney: Number eight and number nine are out.

The Court: Number eight and number nine are not within the motion.

Mr. Maroney: That is right.

Number ten is not within the motion.

The Court: Number ten is not within the motion.

Mr. Maroney: Number eleven is within the motion.

The Court: How about number twelve?

Mr. Maroney: That is within the motion, your Honor.

The Court: How about number thirteen?

(1273) Mr. Maroney: That is really—that would be within the motion.

There are two keys identical, one is eleven and one is thirteen.

The Court: How about fourteen?

Mr. Maroney: Fourteen is not within the motion.

The Court: How about fifteen?

Mr. Maroney: Number fifteen is not within the motion.

The Court: How about sixteen?

Mr. Maroney: Number sixteen is within the motion.

Number seventeen is within the motion.

The Court: How about eighteen?

Mr. Maroney: Number eighteen is not within the motion.

The Court: All right.

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Mr. Maroney: Nineteen and twenty are without the motion.

The Court: Nineteen and twenty is not within the motion.

Mr. Maroney: No, sir.

Mr. Tompkins: Or number twenty, your Honor.

(1274) The Court: Twenty-one?

Mr. Tompkins: Within.

The Court: Number twenty-two?

Mr. Tompkins: Without.

The Court: Twenty-two is not within?

Mr. Tompkins: Not within, sir.

The Court: How about twenty-three?

Mr. Tompkins: Twenty-three to twenty-nine are without, your Honor; and number thirty is within.

The Court: Just a moment.

You said twenty-three to twenty-nine inclusive?

Mr. Tompkins: That is right, sir.

The Court: Twenty-nine is the sketch book. I understand that that is not within the motion.

Mr. Maroney: That is correct, your Honor.

The Court: How about number thirty?

Mr. Tompkins: Number thirty is within, your Honor.

The Court: Thirty-one?

Mr. Tompkins: Without.

The Court: Number thirty-two?

Mr. Tompkins: Without.

(1275) The Court: Number thirty-three?

Mr. Tompkins: Without.

The Court: Number thirty-four?

Mr. Tompkins: Thirty-four to thirty-seven are without, your Honor, inclusive.

The Court: Thirty-four to thirty-seven are without?

Mr. Tompkins: Yes.

The Court: Now, on this list apparently, thirty-eight and thirty-nine have been scratched out.

I don't know what they mean.

So that number forty is actually thirty-eight?

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Mr. Tompkins: I guess that that would be correct, your Honor.

The Court: Is that within?

Mr. Tompkins: That is within.

The Court: Well, now, so as to be sure that we agree, the result of our talk is that item number three, four, six, seven, eleven, twelve, thirteen, sixteen, seventeen, twenty-one, thirty, and what is called here forty, but which is actually thirty-eight, are the subject of the motion.

Mr. Fraiman: No, your Honor, there are three (1276) and a half additional pages of items following that.

I don't think most of them will be the subject of the motion, but there may be a few items.

Mr. Maroney: There are. I think I can itemize the additional things which we lay claim to which may simplify our going through the entire list.

The Court: If we get through the list, we will avoid mistakes in the future.

Mr. Maroney: It is my understanding, your Honor, that there are three items which are not in any of the lists attached here.

The Court: Let's get through what isn't here after we get through with what is here.

This schedule bears at the bottom, D-1; is there anything on that schedule which is not comprehended in the motion?

Mr. Tompkins: On D-1, there is nothing, your Honor.

The Court: In other words, everything on D-1 is the subject of the motion?

Mr. Tompkins: Is not the subject of the motion. Is without.

(1277) The Court: I just strike out D-1 in its entirety.

Mr. Tompkins: That is correct, sir.

The Court: How about D-2?

The first group seem to be suit case and wearing apparel.

Mr. Tompkins: D-2, your Honor, is all without.

The Court: The whole page?

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Mr. Tompkins: Yes, sir.

The Court: Now, D-3.

Mr. Tompkins: On D-3, your Honor, there are just two items that are within.

The Court: Will you read them?

Mr. Tompkins: Two rolls green insulated wire. It is about the twelfth item down, sir.

The Court: Two rolls of green insulated wire, those are part, they are the subject matter or part of the subject matter in the motion; right?

Mr. Tompkins: That is correct, your Honor.

And the item following, one wire tap apparatus.

The Court: That is also——

(1278) Mr. Tompkins: The subject.

The Court: Included in the motion.

Mr. Tompkins: That is correct, your Honor.

The Court: Anything else on page D-3?

Mr. Tompkins: Nothing else.

The Court: So that with those two exceptions, I will just mark that out.

Mr. Tompkins: That is correct, sir.

The Court: Now, on D-4.

Mr. Tompkins: The first item, one bankbook for East River Savings, balance \$13,086.22, [\$1386.22] is within, your Honor.

The first seven items on page four are within.

In other words, your bankbook and the bills.

The Court: The last item that I think you referred to is bills, Payton, Ltd., Collins.

Mr. Tompkins: That is correct, your Honor.

The Court: All those are in.

Now, how about the next items?

Mr. Tompkins: The next items are without, your Honor.

The Court: Now, that includes brown paper wrapper and zipper brief case, contains four thousand (1279) and dollars in twenty-dollar bills. That is included in your statement that it is not within?

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Mr. Tompkins: It is not within.

The Court: Now, are there other items that are not listed in the schedule that you wanted to call attention to?

Mr. Fraiman: Yes, your Honor.

We are discussing those items now.

May we have a moment to discuss the items?

The Court: Surely.

(Defense counsel and Government's counsel engaged in a discussion out of the hearing of the Court.)

Mr. Maroney: Your Honor, there are two additional items which, I think, were among the possessions that were removed with the defendant from the Hotel Latham hotel room, but they are not shown in the schedule.

The Court: Are they to be retained in the motion?

Mr. Maroney: They are to be retained as far as the Government is concerned, your Honor.

The Court: Those are?

Mr. Maroney: One is a birth certificate in (1280) the name of Emil Goldfus.

The Court: Has it a date?

Mr. Maroney: That is birth certificate number 33318.

The Court: 33318?

Mr. Maroney: Yes, sir.

New York.

The Court: Issued by whom?

Mr. Maroney: That is a New York State or County birth certificate.

(1281) The Court: It may be important to know whether it was issued by the New York County or some other county.

Mr. Maroney: State of New York certificate of birth No. 33318, in the name of Emil Robert Goldfus.

The Court: What is the date of the alleged birth, according to the certificate?

Mr. Fraiman: August 2nd, 1902, your Honor.

The Court: August 2, 1902?

Mr. Fraiman: Yes, your Honor.

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The Court: And the place?

Mr. Maroney: 120 East 87th Street.

Mr. Tompkins: That is what it looks like, sir.

Mr. Maroney: There is a further way we may identify it, your Honor, and that is a photographic copy attached as an Exhibit D to an application for search warrant which is filed in this court and the particular birth certificate in question is Exhibit D to an affidavit by special Agent Joseph F. Phalan, and the application was filed, I believe, on June 28, 1957.

The Court: I still don't understand why the (1282) birth certificate didn't give a place of alleged birth, I think that is very important; but if it doesn't, it doesn't.

Mr. Maroney: It gives this address, your Honor.

Mr. Tompkins: It looks like East 87th Street, to me.

Mr. Donovan: It bears a stamp, received August 7, 1903, Bureau of Records, Borough of Manhattan.

The Court: All right.

Now, what was the other paper, please?

Mr. Maroney: The other one is a birth certificate in the name of Martin Collins.

The Court: So that I understand that, for the purposes of this motion, these items should be deemed to be attached to and form part of the Schedule D-4?

Mr. Tompkins: That is correct, sir.

The Court: At the risk of repetition, but just to be sure that we understand the situation, the items other than those that are described in the subject of the motion, are deemed to have been requested by the defendant for return and the (1283) Government has stated that it is ready and willing to make the return.

The defendant says that he prefers that those items remain in the custody of the Government for his convenience.

Mr. Donovan: At this time, your Honor.

Mr. Fraiman: That is correct, your Honor.

It is understood, of course, that the Government, although it has consented to return these items, will not in

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any way use the items themselves or the fruits of the items in this case.

The Court: Oh, I don't know anything about that. I don't know what their plans are.

I am only concerned with the scope of this motion.

Mr. Fraiman: May I inquire of the Government at this time whether they will agree that they will not use any of these items that are without the scope of this motion?

The Court: I shouldn't require them to agree to anything as a condition of conducting this hearing.

I should suppose that the Government would be free to act or refrain from acting, I don't know (1284) what their attitude is.

Mr. Fraiman: Our problem would then be, your Honor, if there would be any possibility in our mind that the Government would use some of these items in anyway, that they have agreed to return to us, we might want those included within the motion so that they could be suppressed.

The Court: I think you are getting at it from the reverse aspect.

The Government has told you that these several items which the return of has been requested may be had now.

You are in the legal position of taking them.

You are requesting the government to retain custody of them as an accommodation to you.

Mr. Fraiman: That's right.

The Court: That covers the situation.

Mr. Fraiman: If your Honor feels that that covers it, we have nothing further.

Mr. Maroney: Your Honor, there are some additional items which were taken from a wastebasket after the defendant had vacated the room.

As I understand it, the defendants are also (1285) making that seizure, search and seizure, a subject of this motion.

The Court: Now, is there any way we can tell what those items are?

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Mr. Fraiman: I believe there are only two items, at most three, and I think Mr. Maroney could describe them in sufficient detail to your Honor.

Mr. Maroney: As far as that search is concerned, I don't believe we have with us a list, your Honor; but I think that we can get a list very shortly.

We might be able to get that list in an hour or so, but as far as that search is concerned, we lay claim to everything that was seized from the wastebasket and we lay particular claim to three items that were seized.

The Court: Well, I suppose that it would have been possible for the defendant to have included those items in the schedule attached to his moving papers.

Mr. Donovan: No, your Honor.

Mr. Fraiman: This schedule that we have attached, your Honor, was submitted by the Govern- (1286) ment.

It is part of the Government affidavit which we have included.

Mr. Donovan: And it was incomplete.

In other words, the items which Mr. Maroney is now describing were not on this list.

Mr. Maroney: It was not complete in this respect, this schedule, as I understand it, it was made up by the Immigration & Naturalization Service, which took these materials.

These other items were taken by the Federal Bureau of Investigation in a subsequent search.

The Court: I don't know what you mean by these other items.

We are talking about the contents of a scrap basket?

Mr. Maroney: That is right.

The Court: Is that what you mean by items?

Mr. Maroney: Yes, sir.

The Court: —the other items?

Mr. Maroney: Yes, sir, the contents of the waste basket.

The Court: What is your pleasure about that?

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Is it agreed that the items in that scrap (1287) basket are deemed to be included in the defendant's motion to suppress?

Mr. Fraiman: Yes, your Honor, that is the defendant's request.

The Court: The defendant's request.

Now, can we find out what they are so as to be specific?

Mr. Maroney: We can get a list, your Honor, yes, sir. We can do it very quickly, I think.

The Court: Is it your idea that we can proceed with the hearing and then return to this item in order to clarify our record?

Mr. Maroney: I think we could, your Honor, but I think first one thing that isn't clear to us, and that is whether or not the defendant at this point claims ownership of the items which were seized from the waste basket.

Now, I don't think he has done so in his affidavit, and it seems to me that in order to have standing to bring this motion in connection with these articles, he must allege ownership in the particular items and particularly a pencil, a wooden pencil which was a container, and which contained (1288) some frames of microfilm.

The Court: I should suppose that you were right, that the basis of his motion is alleged ownership of the articles.

Mr. Fraiman: Yes, your Honor; however, in the defendant's affidavit, in the last sentence on page three.

The Court: You say the defendant's affidavit?

Mr. Fraiman: Yes, sir, your Honor. Rudolf Abel's affidavit.

I believe it is before those exhibits, your Honor,—

Mr. Donovan: Just before those exhibits, your Honor.

The Court: What page, please?

Mr. Fraiman: Page three, your Honor, of the defendant's affidavit.

The last full paragraph.

Mr. Donovan: Commencing with, "All objects," your Honor.

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We intend by that to cover all these objects.

The Court: You mean the last sentence which reads, "All objects seized in my room are (1289) owned by me."

Mr. Donovan: Yes, your Honor.

The Court: And your statement is that the defendant intended by that expression to claim ownership of the contents of the scrap basket, is that right?

Mr. Fraiman: Yes, your Honor.

The Court: Does that meet the legal requirements?

Mr. Maroney: Well, your Honor, it would seem to me that this affidavit by the defendant was drawn on the basis of the attached schedule, and we would prefer a specific—

The Court: A categorical claim?

Mr. Maroney: A categorical claim.

The Court: Any objection to preparing a supplemental affidavit to that effect?

Mr. Fraiman: No, your Honor. We most certainly will.

The Court: Now, then, we are a little bit in doubt as to those items until we get a list of them.

Mr. Maroney: Yes, sir.

I have just asked that a list be secured.

(1290) The Court: All right.

Are we ready for the hearing?

Mr. Donovan: Yes, sir.

Mr. Fraiman: The defendant is ready.

The Court: All right.

Mr. Donovan: Your Honor, may we ask that the Government produce as the first witness, Robert E. Schoenberg?

Mr. Maroney: He is upstairs, your Honor.

May we have about three minutes to bring him down?

The Court: Yes.

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Robert E. Schoenenberger, for Defendant—Direct.

(1291) ROBERT E. SCHOENENBERGER, called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Donovan:

Q. Mr. Schoenenberger, do you recall signing an affidavit for use in this case on the 25th of September, 1957?

A. Yes, sir.

Q. And you stated in that affidavit that you are "a supervisory investigator for the Immigration & Naturalization Service, United States Department of Justice, Washington, D. C. I reside at 2020 Peabody Street, Hyattsville, Maryland."

You recall that? A. Yes, sir.

Q. And that is the truth? A. Yes, sir.

Q. Would you briefly describe your duties in the District of Columbia? A. I supervise the investigation of what we call special investigations in the Immigration Service.

Special investigations include subversive, criminal, immoral, and narcotic types of investigations.

(1292) Q. Now, in the succeeding paragraph of this affidavit you describe certain of your activities in the City of New York on June 21, 1957? Now, preparatory to those activities, had you been instructed to come to New York from the District of Columbia? A. Yes, sir.

Q. And may I ask who gave those instructions? A. Mr. Noto. N-O-T-O. Mario T. Noto. M-A-R-I-O T. Noto.

Q. When did he give these instructions? A. June 20 and—

Q. Could you state the time approximately? A. Approximately three P. M.

Q. What is the title of Mr. Noto? A. Deputy Assistant Commissioner for Investigations.

Q. I take it from his title that he is directly beneath the Commissioner; is that correct? A. No, sir.

*Excerpts of Hearing on Motion to Suppress.**Robert E. Schoenenberger, for Defendant—Direct.*

Q. Could you explain that, please? A. The Commissioner, and then for investigations, assistant commissioner for investigations, then deputy assistant for investigations, and then myself.

Q. Do you know from whom Mr. Noto received this (1293) information?

Mr. Maroney: Objection.

The Court: We haven't heard anything about any information yet.

All we have heard is that this witness was instructed to come to New York.

Mr. Donovan: All right.

By Mr. Donovan:

Q. What were Mr. Noto's instructions to you? A. He furnished me with information that had been received from the Federal Bureau of Investigation and instructed me to supervise the apprehension of the subject of the information.

Q. What was that information which he gave to you? A. It was to the effect that a person, a Colonel in the Russian Secret Service, was illegally in the United States, was operating in New York City, and was suspected of espionage.

Q. And I am correct in understanding your testimony to be that Mr. Noto told you that he had received this information from the Federal Bureau of Investigation; is that correct? A. Not entirely.

Q. Would you please, then, explain further how your (1294) Service obtained this information, to the best of your knowledge? A. To the best of my knowledge, Mr. Noto said our Service had obtained this information from the Federal Bureau of Investigation. Whether or not it was furnished him personally by the Federal Bureau of Investigation I don't know.

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Robert E. Schoenberger, for Defendant—Direct.

Q. Now, after you received the instructions to proceed to New York City, did you contact anyone in your Service in New York in relation to the matter?

The Court: Mr. Donovan, if you mean "did you communicate," "did you speak," "did you write," will you please state that?

The word "contact" doesn't mean anything; certainly nothing precise.

He can speak to a person; he can have a collision with him; he can write to him; he can telephone to him. Those are all definite.

By Mr. Donovan:

Q. In any manner, did you communicate with anyone in your Service in relation to this matter? A. Yes, sir.

Q. In New York City? A. Yes, sir.

(1295) Q. Who was that? A. Mr.—Investigator Edward Farley.

The Court: Is that—

The Witness: Edward Farley. F-A-R-L-E-Y.

By Mr. Donovan:

Q. What did you say to Mr. Farley? A. I asked him to meet me at the airport.

Q. Did you in any way indicate over the telephone the object of your trip to New York? A. No, sir.

Q. After your arrival in New York City—and may I ask at what time did you arrive in New York City? A. Approximately ten-thirty P. M.

The Court: On the 20th of June?

The Witness: Yes, sir.

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By Mr. Donovan:

Q. And you were met by Mr. Farley? A. Yes, sir.

Q. Did you and Mr. Farley then have any conversation in relation to this matter? A. Yes, sir.

Q. Will you please tell us what you said to him and what he said to you?

Mr. Maroney: Objection, your Honor. He can (1296) just ask for the general conversation in the matter.

The Court: What bearing has that on your motion?

Mr. Donovan: Well, we believe, your Honor, that we are entitled to develop all the facts and circumstances surrounding the arrest and the search and seizure. And we believe, sir, that by the manner in which I am approaching this that we will show that at all times the Federal Bureau of Investigation was actually directing the movements of the Immigration Service.

The Court: The testimony of this witness is that he was acting under the orders of a superior, and he doesn't say that the superior was being directed by the Federal Bureau of Investigation.

He said the F. B. I. furnished information to his superior.

By Mr. Donovan:

Q. Did you give any instructions to Mr. Farley with respect to the arrest of Mr. Abel or the search of Mr. Abel's possessions?

The Court: Are you now on the 21st of June?

Mr. Donovan: I am, at any time subsequent to Mr. Schoenenberger being met at the airport by Mr. (1297) Farley.

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Robert E. Schoenenberger, for Defendant—Direct.

The Court: Were you Mr. Farley's superior?

The Witness: Yes, sir.

The Court: Did you give him any instructions after you met him?

The Witness: Immediately?

The Court: Yes.

The Witness: I instructed him to take me to the New York District Office.

The Court: He instructed Farley to take him to—the witness—to the New York Office of the Immigration Service.

Is that correct?

The Witness: Yes, sir.

By Mr. Donovan:

Q. Did he take you there? A. He did.

Q. After your arrival at the Immigration office, did you give any instructions, either to Mr. Farley or to anyone else in your Service, reporting to you in connection with the arrest or the search relating to Abel? A. Yes, I discussed the case with the district director, Mr. Murff.

Q. What were the instructions that you gave? (1298)
A. I didn't give him any instructions.

Q. Did you discuss with him the information which you had received in Washington? A. I did.

Q. Did you discuss with him what action should be taken by the service in reliance on that information? A. Did I discuss with him, did you say?

Q. That is correct. A. Yes.

Q. Would you please tell us what you said to him and what he said to you? A. I furnished him the information that had been furnished by the Federal Bureau of Investigation, and we concluded that an order to show cause and a warrant of arrest should be issued and served on the subject.

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Robert E. Schoenenberger, for Defendant—Direct.

Q. Were such a warrant and such a show cause order—were they subsequently prepared? A. They were subsequently signed by Mr. Murff.

Q. I take it from your answer that you had brought these documents with you? A. I had. Unsigned.

Q. Now, at what time would you say that Mr. Murff signed these documents? A. Approximately midnight.

(1299) Q. And on whose instructions had you brought these documents from Washington? A. Actually no one's instructions had I brought the documents.

I wouldn't need any. If I am given evidence that a person is illegally in the United States, I wouldn't need any instructions to prepare or cause to be prepared an order to show cause and a warrant of arrest.

Q. Did you personally prepare these documents? A. I participated in the preparation.

Q. Who else participated in the preparation of them? A. Mr. Noto and Mr. Kanzler.

Q. Who is Mr. Kanzler, please? A. He is an investigator in the Washington office, Immigration service.

Q. Now, after these documents had been executed at midnight, did you discuss with anyone when the documents would be actually served on the suspect? A. Yes.

Q. With whom, please? A. Mr. Murff, Mr. Farley, and Investigator Edward Boyle, and Kanzler.

Q. Did you discuss when these documents would be served on Abel with any representative of the F. B. I.? (1300) A. I did.

The Court: He didn't know that the defendant was Abel at that time. You have that in mind, have you?

Mr. Donovan: Yes, your Honor.

The Court: He was described as a suspect by the witness.

Mr. Donovan: Yes, your Honor.

Excerpts of Hearing on Motion to Suppress.

Robert E. Schoenenberger, for Defendant—Direct.:

By Mr. Donovan:

Q. I take it your answer is that you did? A. I did.

Q. Who were those representatives of the F. B. I.? A. Mr. Gamber, Blasco, Mr. O'Brien, I believe, Phelan. O'Brien, I believe that's the name. I am not positive of all these names.

Q. How many men would you say were representing the F. B. I.? A. Oh, approximately eight. Six or eight, I would say.

Q. Now, at what time did you have these discussions with the F. B. I. representatives? A. Immediately after midnight, June 21.

Q. And, again, what did they say to you and you say to them, to the best of your recollection? A. We asked them to show us where the suspect was so that we would—properly identify the suspect for us, and told (1301) them what we proposed to do.

They asked to be allowed to first contact the suspect.

The Court: Will you tell me what you mean by that?

The Witness: Or communicate. Yes, your Honor?

The Court: They asked what?

The Witness: To interview, your Honor.

The Court: They asked permission to interview the suspect?

The Witness: Prior to our arrest.

By Mr. Donovan:

Q. Did they state their reasons for making that request?

A. I am not positive that they stated their reasons. I assumed they—

Mr. Maroney: Objection, your Honor.

The Court: Don't tell us what you assumed, please.

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Robert E. Schoenenberger, for Defendant—Direct.

By Mr. Donovan:

Q. This meeting, I take it, was held in the Immigration Service offices, is that correct, with the F. B. I. representatives? A. No, sir.

(1302) Q. Where was that meeting? A. In the New York headquarters of the F. B. I.

Q. So that we be clear on this, when Mr. Murff and you discussed Mr. Murff's execution of the two documents, you were in the Immigration Service Headquarters, is that correct? A. That is correct.

Q. Were any F. B. I. men present at that time? A. They were not.

Q. You then proceeded to the F. B. I. headquarters, is that correct? A. That is correct.

Q. At whose request were you going to the F. B. I. headquarters? A. My own initiative.

Q. At that time of the night, on your own initiative, you went over there expecting to meet eight men? A. I had already called them, told them that I would be there that night.

Q. When did you make that telephone call? A. Prior to leaving Washington. In fact,—I had better correct that—I notified the representatives of the F. B. I. in Washington and asked them to communicate with New York.

(1303) Q. So that your meeting at F. B. I. headquarters after midnight was by prearrangement made in Washington? A. Right.

Q. Had you been instructed to call the F. B. I. headquarters in Washington or did you do that on your own initiative? A. I think I did that on my own initiative.

Q. Had you been requested to call them? A. I do not remember.

Q. Now, you return to your meeting in the F. B. I. headquarters, after midnight, what was the substance of your discussion at that time with respect to this request by the

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F. B. I. that they be permitted to interview the suspect prior to the arrest, to the best of your recollection? A. To the best of my recollection, I readily agreed.

Q. To the best of your recollection, there was no discussion—there was no discussion of why they were making this request? A. I don't remember any discussion of it, no; no discussion.

Mr. Maroney: I think, your Honor, the witness has already testified that he didn't recall any discussion of it, and then he started to say that he assumed some reason, which was cut off.

(1304) The Court: Yes.

Mr. Maroney: I think that it has been covered.

By Mr. Donovan:

Q. Are such requests customarily—

Mr. Maroney: Objection, your Honor.

By Mr. Donovan:

Q. (Continuing)—or even frequently made, to you in relation to such arrest?

Mr. Maroney: Objection.

(1305) The Court: I sustain the objection.

By Mr. Donovan:

Q. Now, after this request had been made was there any further discussion with respect to what arrangements should be made for the arrest? A. Yes.

Q. Would you explain what those arrangements were, please? A. The F. B. I. was furnished by me with the contents of the order to show cause and warrant of arrest, the information contained in the two documents, and were told that we intended to arrest the subject—suspect—and

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would they cooperate by locating or showing us the location of the suspect.

I believe arrangements were made for Investigator Farley, Investigator Boyle to proceed to the Latham Hotel by their own automobile, a Government automobile owned by the Immigration Service, and that I would accompany—Kanzler and I would accompany agents of the F. B. I. to the spot in one of their automobiles.

Q. Now, early in the morning of June 21 I take it you met these agents of the F. B. I.; is that correct? A. Shortly after midnight. Soon after.

Q. I am speaking now after—I assume you then (1306) had some few hours' sleep? A. That is correct.

Q. And then did you meet these agents of the F. B. I.? A. That is correct.

Q. Where did you meet them? A. At the F. B. I. headquarters.

Q. And I take it to be your testimony that in an F. B. I. automobile, you then traveled to the Hotel Latham, is that correct? A. That is correct.

Q. Now, at what time did you arrive at the F. B. I. headquarters that morning? A. I stayed there.

Q. And accordingly what time did you then leave F. B. I. headquarters in the morning? A. Approximately six-thirty A. M.

Q. What F. B. I. agents were in the automobile with you? A. Mr. Willis, Mr. Wiedke. Wiedke is spelled W-I-E-D-K-E, I believe.

The Court: What was the first name?

The Witness: Willis.

By Mr. Donovan:

Q. Do you know, Mr. Schoenenberger, what positions (1307) these men occupy in the F. B. I.? A. They told me that they were special agents.

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Q. Did they tell you to what office they were attached?

A. They did.

Q. What was that office? A. New York City.

Q. Now, at what time approximately did you arrive at the Hotel Latham? A. Very near—shortly before seven A. M.

Q. What did you do after your arrival at the Hotel Latham prior to your entrance into Room 839? A. I cruised about the area in the F. B. I. car.

Q. Until what time? A. Approximately seven-thirty.

Q. Did the agents remain in the car with you while you were cruising in the area? A. They did.

Q. You entered the Latham, then, at seven-thirty; is that correct? A. Approximately seven-thirty.

Q. Approximately seven-thirty. And what did you do after you entered the Hotel Latham? (1308) A. Went directly to the suspect's room.

Q. When you arrived was the door to the room open? A. It was.

The Court: What did you say?

The Witness: It was, your Honor.

The Court: The door was open?

The Witness: Yes, your Honor.

By Mr. Donovan:

Q. Did you immediately enter the room? A. I did.

Q. Had you entered the Latham at that specific time at anyone's request? A. No, sir.

Q. Was it not by any pre-arrangement that you were simply cruising around while these other events were taking place? A. Yes.

Q. What was that arrangement? A. Mr. Gamber and Blasco—special agents Gamber and Blasco were designated by the F. B. I. to interview the suspect shortly after seven A. M.

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I designated Messrs. Farley and Boyle to stand by, and at the end of the interview by the special agents of the F. B. I. they were told to serve the order to show cause (1309) and the warrant of arrest on the subject.

Q. When you say "stand by," you meant stand where?

A. Stand in the hallway or an adjoining room of the hotel.

Q. When you entered Room 839 that morning, who were in the room? A. Edward Farley, Edward Boyle, Immigration Investigators.

Special Agents Gamber and Blasco were just leaving.

Q. But they all were in the room when you arrived? A. I think Gamber and Blasco were at the door. I could not say whether they were in the room or outside. They were more or less at the door.

Q. Now, you have stated in this affidavit, Mr. Schoenenberger, that "I entered Room 839 of this hotel at approximately seven-thirty A. M. for the purpose of supervising the arrest of Abel and the examination of his personal effects in an effort to locate documentary evidence of alienage."

Is that correct? A. It is, sir.

Q. Now, of course, when you entered Room 839 Abel had already been arrested, had he not? A. That is correct.

(1310) Q. So that when you state that you entered for the purpose of supervising his arrest, what did you mean by that? A. Well, possibly taking him into custody would be more correct.

Q. Now, with respect to this examination of his personal effects in an effort to locate documentary evidence of alienage, may I ask you first your understanding of the meaning of the term alienage? A. It is a person who is not a citizen or national of the United States. That's the way it has been used by me.

Q. That is an alien, but alienage means, does it not, the status of being such a person? A. Exactly.

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Q. Now, did you make any such examination of his personal effects? A. Superficial examination of his personal effects.

Q. Did the other immigration officers under your direction make a more thorough examination? A. The other officers assisted me in the superficial examination.

Q. In your presence was no thorough examination of these effects made? (1311) A. In that hotel room?

Q. In that room. A. No, sir.

Q. Now, with respect to your efforts to locate documentary evidence of alienage, did you find any such documentary evidence? A. We found documents that would tend to substantiate our information that we had received from the F. B. I.

Q. I ask you again: You have stated here that your purpose in entering that room was "to examine his personal effects in an effort to locate documentary evidence of alienage."

Now, I am simply asking you, did you find any such documentary evidence of alienage? A. May I ask that is your definition of documentary evidence?

Q. You have used the term.

The Court: Why don't you ask the witness what he found, Mr. Donovan, without asking him to characterize its probative value?

Mr. Donovan: Your Honor, this is a very important point.

By Mr. Donovan:

Q. Now, I would take it that documentary evidence (1312) of alienage, on your own characterization—your own definition—would be documents which would evidence the alien status of the suspect. Isn't that right? A. Yes.

The Court: Please don't argue with the witness.

Mr. Donovan: He has already agreed with me, your Honor. The argument is over.

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The Court: I wish he wouldn't agree with your arguments. I wish he would confine his answers to questions of fact.

By Mr. Donovan:

Q. And did you find any such documentary evidence of his status as an alien? A. Yes.

Q. Yes or no?

Mr. Maroney: Objected to, your Honor. I think he should ask what was found in the hotel room.

The Court: I think so, too.

I have tried twice to get that in.

The witness doesn't need to give his opinion as to the value of papers in the evidentiary sense.

Ask him what he found.

Mr. Donovan: Your Honor, this is extremely import- (1313) ant.

The Court: All right, don't ask him what he found. I am telling you what I would like to have you do. Of course, you can disregard my instructions; I realize that.

By Mr. Donovan:

Q. Did I understand, Mr. Schoenenberger, that before you testified that what you did find in that room confirmed, as you put it, the information the F. B. I. had given you?

The Court: I will exclude the question, Mr. Donovan.

Mr. Donovan: Your Honor—

The Court: I will exclude the question. The witness does not need to characterize the probative value of the documents.

Now, please. He can tell you what he found, but what they do tend to prove is not for him to say.

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Mr. Donovan: Your Honor, may I have the previous question and answer read?

The Court: You will please ask your next question, Mr. Donovan. He does not need to give his opinion as to what documents tend to show, if you (1314) please.

Mr. Donovan: Yes, your Honor, but he did make that statement.

The Court: I know you like to argue. We all like to argue. Will you please just move along?

By Mr. Donovan:

Q. May I ask how many years you have been in the Immigration & Naturalization Service, Mr. Schoenenberger? A. Sixteen.

Q. And does not that Service have general charge of many matters pertaining to aliens?

Mr. Maroney: Objected to as immaterial, your Honor. I think that it is obvious.

The Court: I thought we knew what the Service has to do with. I don't think that touches the object of this inquiry.

Mr. Donovan: Your Honor, I would think he is an expert witness on what is evidence of alienage if he has spent those years—

The Court: I suspected you were trying to approach the subject again, and I tell you that I am not going to listen to the witness' opinion as to what those documents show.

Now, take that from me.

(1315) Mr. Donovan: Under those circumstances, your Honor, I believe that those would be the only questions that I would ask this witness.

The Court: All right.

Any cross?

Mr. Maroney: Just a few questions, your Honor.

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Cross examination by Mr. Maroney:

Q. Mr. Schoenenberger, I believe you stated that you received information on June 20th, 1957, from Mr. Mario Noto, your superior in the Immigration Service.

Now, upon receipt of that information were you instructed by Mr. Noto to review that information for any purpose?

Mr. Fraiman: Objection, your Honor. That is a leading question.

Mr. Maroney: It is cross examination, your Honor.

The Court: Cross examination.

Mr. Fraiman: Your Honor, this agent—

The Court: Overruled. It is proper cross examination.

Mr. Donovan: Your Honor, with respect to all (E316) of these witnesses it was my understanding that because they are all F. B. I. agents or Immigration agents, that we are obviously examining hostile witnesses and we can ask leading questions.

Mr. Maroney: I don't think that this witness has done anything to demonstrate hostility to anybody.

The Court: Overruled.

Mr. Donovan: He submitted an affidavit.

The Court: After a while, counsel will accept a ruling. The objection was overruled. Proceed.

By Mr. Maroney:

Q. Do you recall the question, Mr. Schoenenberger? A. Was I instructed?

Q. The question was upon receipt of this information were you instructed to review the information for any purpose? A. That is correct. I was instructed.

The Court: You were.

The Witness: That is correct, your Honor.

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Q. (By Mr. Maroney): Will you state the instructions and the purpose for which you were to review the information? (1317) A. To determine whether sufficient—there was sufficient basis for the issuance of an order to show cause and a warrant of arrest.

Q. As a result of these instructions, did you review the information? A. I did.

Q. What was your determination as to whether or not there was sufficient information to issue an order to show cause? A. I determined there was sufficient.

Q. As a result of that determination, I believe you have stated that, in your previous testimony, you did assist in preparing an order to show cause and a warrant of arrest in Washington; is that correct? A. That is correct.

Q. I think also you stated that you then brought those papers to New York? A. That is right.

Q. And you submitted them to the district director? A. That is right.

Q. Did he, to your knowledge, then review the information that had been furnished to you for the purpose of satisfying himself as to the sufficiency of the information to issue an order to show cause?

(1318) Mr. Fraiman: If your Honor please, may we at this time have a continuing objection to this examination of counsel?

The Court: I don't have any faith in the continuing objections.

Mr. Fraiman: I shall object to this question on the ground that it is leading, your Honor.

The Court: On what?

Mr. Fraiman: On the ground that it is a leading question.

The Court: I think it is leading in form.

I think it would be proper to ask if this witness and the district director discussed the information as to which he has just testified.

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Did you discuss that with the district director?

The Witness: I did discuss it with the district director.

He did review the information available to the service, and did conclude that there was sufficient basis for an order to show cause and a warrant of arrest.

By Mr. Maroney:

Q. And he then signed the order to show cause? A. He did.

(1319) Q. You previously testified also that you entered the room occupied by the defendant at the Hotel Latham on June 21st at about seven-thirty A. M. Is that right? A. That is correct.

Q. How long did you remain in the room thereafter? A. Not over an hour.

Q. And at the time you left would you state who left with you? A. The defendant, Investigator Farley, Boyle, and Kanzler.

The Court: What is that last name?

The Witness: Kanzler, your Honor. K-A-N-Z-L-E-R.

The Court: Have we that room number in the record?

Mr. Maroney: 839, your Honor.

Yes.

The Court: Is it agreed that it was room number 839?

Mr. Denovan: Yes, your Honor.

By Mr. Maroney:

Q. Would you state where you went, Mr. Schoenenberger, when you left the room? —you and the defendant

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and the other I & S investigators? A. Out the back of the hotel to the immigration auto- (1320) mobile.

From there directly to the New York District offices of the Immigration Service.

Q. So that you were in the room approximately one hour? A. Not over that, yes, sir.

Q. And was the defendant there during all that time? A. He was.

Q. During that hour would you briefly describe what took place in that room with respect to the effects of the defendant? A. Yes. The defendant was asked by me if he wanted to take all of his personal effects.

He stated that he did with some reservations.

He was allowed to choose what he took and what he left in the room. We assisted him—when I say we, the four Immigration investigators, including myself—to pack his belongings.

And of course, we searched his—the clothing that he put on and his baggage for any dangerous weapons and also I made a superficial search for evidence of alienage.

The defendant discarded certain items.

(1321) Q. You say “discarded.” What do you mean by that? Would you explain that further? A. Yes. He had some little jars of painters’ supplies on the window sill. He stated that he wanted to leave them. He didn’t want to take them.

He threw a handful of pencils into the wastebasket.

There were different things—a couple of packages of Kleenex—that he chose not to take.

After the baggage was packed and the defendant was dressed, he asked permission to repack one of the larger bags—asked for permission from me to repack one of the larger bags.

I gave him this permission and noticed while he was repacking the bag, that he was attempting to slip some papers into his right sleeve.

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I reached down, pulled his hand up, removed the three pieces of paper.

Q. Now, can you describe the three pieces of paper?

Did you look at the three pieces of paper when you took them from him? A. Yes.

Q. Can you describe those papers that you did take from him? (1322) A. Two of them were strips with but a few lines on them.

One—they had Spanish words on them. One started out with the word "Balmora;" the other started out with the word "in"—that looked like "in Mex." I noticed the word "Chihauhau" in the body of it.

The other was a piece of paper like graph paper with number groups on it, five numbers in a group. I suppose there were about eight lines—eight or ten lines.

(1323) Mr. Maroney: Your Honor, I would like to direct the witness' attention to photographic copies of three documents which are attached to the affidavit of special agent Joseph Phelan which was referred to earlier this morning in connection with these proceedings, and, particularly, to direct the witness' attention to Exhibits G, I, and J.

• The Court: Have I a copy of that affidavit?

Mr. Maroney: There is a copy on file with the Court, your Honor, in connection with the search warrant proceedings?

The Court: Mr. Scott just handed me from the files the affidavit of Joseph F. Phelan, verified June 28, 1957.

Is that correct?

Mr. Maroney: Yes, sir, that is it.

The Court: And is that the affidavit on which the search warrant was based?

Mr. Maroney: That is correct, sir.

The Court: Thank you.

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Now, you are referring to Exhibits G, I, and J in that affidavit?

Mr. Maroney: That is a search warrant in a later search, your Honor. It is not a search warrant in (1324) connection with the search of the hotel room. We are merely using these as exhibits for the purpose of this testimony.

The Court: But your question is: You called the witness' attention to Exhibits G, I, and J attached to that affidavit?

Mr. Maroney: Yes, sir.

The Court: Is that correct?

Mr. Maroney: Yes, sir.

By Mr. Maroney:

Q. I will ask you, Mr. Schoenenberger, if you recognize those photostat copies or photographic copies (counsel hands documents to witness)? A. (Witness examines documents.) I do.

Q. Would you state what they are photographs of? A. They are photographs of the material that I extracted from the right hand of the defendant as he attempted to slip them into his left—or, right—coat sleeve.

Q. Now, do you recall while you were in the hotel room on this morning of June 21st, between seven-thirty and eight-thirty, whether or not you saw a document which purported to be a birth certificate in the name of Collins? A. I did.

(1325) Q. Do you recall the circumstances under which you saw that document? A. Only that it was among his other effects.

The Court: What is that name, please?

The Witness: Martin Collins.

Mr. Maroney: May I have that affidavit, please?

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By Mr. Maroney:

Q. Referring again—

The Court: I take it one of two items is added to Schedule B-4?

Mr. Maroney: That is so.

By Mr. Maroney:

Q. Again directing your attention to a photograph of a document which is made Exhibit E to the aforementioned affidavit of special agent Phelan, I ask if you can identify that photograph? (Counsel hands document to witness.)

A. (Witness examines document.)

That is the birth certificate that I saw in the hotel room, of Martin Collins.

Q. Now, I believe you also stated that the defendant during the packing—I don't have a clear recollection of this. Perhaps I had better put it as a new question.

(1326) During the packing, did the defendant himself take any part in connection with the packing? A. Yes, he did.

Q. Would you describe what part he took in that? A. Mostly indicating what he desired to leave in the room and what he desired to take with him, and he requested my permission to repack the large bag.

Q. Were there some items which he had made inquiry as to whether he should take with him? A. Yes. He picked up a carton of cigarettes that had spilled out of the carton so that the packages were loose in the large bag and asked whether or not he should take the cigarettes and if he did, would he be given access to them.

Q. Do you recall what he was told upon that inquiry? A. I told him myself that he would be given access to them, to take them along if he so desired. He could take anything that he wanted.

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Q. May I ask were you in the room continuously from your original entry at about seven-thirty in the morning until you left in company with the defendant at about eight-thirty to take him down to I & S Headquarters? A. I was.

(1327) Q. And during your stay in the room, did you observe any F. B. I. agents which may have been present conducting a search of the effects of the defendant?

Mr. Fraiman: Objection, your Honor, to the form of the question.

The Witness: No, sir.

The Court: Why?

Mr. Fraiman: It is argumentative, your Honor. He is asking one question whether the F. B. I. agent was present and whether they were conducting a search and of course, I ask that he break it down into two questions.

By Mr. Maroney:

Q. As a preliminary, during that hour were any F. B. I. agents present during any of that time in the hotel room?

A. Gamber and Blasco were just leaving as I came in. They probably were in the doorway.

Q. So, then, during that hour that you were in the hotel room did you observe any F. B. I. agents making a search of any of the effects of the defendant? A. I did not.

The Court: Were there any F. B. I. agents in the room during that hour?

(1328) The Witness: No, your Honor, with the exception of Gamber and Blasco, who were just—

The Court: You said they were in the doorway, as you were entering.

The Witness: That is correct.

The Court: During the hour that elapsed was there any F. B. I. agent in the room?

The Witness: No, your Honor.

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By Mr. Maroney:

Q. You mentioned earlier that during the packing of the effects of the defendant that he discarded certain items. Do you know what was found in the wastebasket, or have you ever seen the items that were found in the wastebasket subsequent to the defendant's leaving the hotel room?

Mr. Fraiman: Objection, your Honor. There is no testimony that any items were found in the wastebasket.

The Court: I think the witness said that the suspect discarded certain things. Yes, he said he put some pencils in the wastebasket and packs of Kleenex.

He may be asked if, in his presence, the defendant put anything else in the wastebasket.

(1329) By Mr. Maroney:

Q. You stated that he put pencils and I think some paints and some other— A. If I remember correctly the painting supplies were left on the windowsill.

The Court: Did you see him put anything else in the wastebasket than pencils?

The Witness: I believe he discarded some Kleenex. I believe he discarded a package of contraceptives in the wastebasket.

By Mr. Maroney:

Q. Mr. Schoenenberger, did you at any time during the packing of the defendant's belongings or at any other time, throw or place any items in the wastebasket that was in the room, room 839? A. I did not.

Mr. Maroney: No further questions, your Honor.
The Court: Is that all of this witness?

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Robert E. Schoenenberger, for Defendant—Re-direct.

Mr. Fraiman: We have a few questions in re-direct, your Honor.

The Court: Yes.

(1330) *Re-direct examination by Mr. Fraiman:*

Q. Mr. Schoenenberger, in response to a question given by the Government, you stated that you reviewed the evidence as to whether you had sufficient basis to show more in a show cause order while you were still in Washington, is that correct? A. That is correct. I reviewed it with two other Immigration people.

Q. Would you tell us what the evidence is that one is required to have before an Immigration warrant could be issued?

Mr. Maroney: Objection.

The Court: Sustained.

Mr. Fraiman: Your Honor, he indicated—

The Court: Sustained.

Q. Would you tell us specifically, then, Mr. Schoenenberger, what the evidence was that you reviewed while you were in Washington?

Mr. Maroney: Objection, your Honor.

The purpose of the testimony, as I understood it, on his direct examination, he was interrogated concerning the possibility of showing, as I get their argument, that the F. B. I. was directing this operation (1331) for the purpose of showing that he did in fact make an independent review from the Immigration standpoint, and it is the purpose of the question on cross-examination.

Mr. Fraiman: I think we are entitled to know what the information was that the F. B. I. supplied Immigration, your Honor.

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The Court: I question that.

The fact is that the witness in the discharge of his official duties reached a conclusion, namely that a warrant of arrest is justified.

Now, he could be right; he could be wrong, but he reached a conclusion.

Mr. Fraiman: Yes, your Honor.

The Court: What is it that you want to establish about that?

Mr. Fraiman: I want to establish, your Honor, what the evidence was upon which he reached this conclusion.

The Court: Why?

Why are you entitled to know that?

Mr. Fraiman: I think, your Honor, we are entitled to know it for two reasons: First, it is our contention that the object of this search and seizure that (1332) was conducted pursuant to the warrant of arrest, that is now in question, was to obtain materials relating to espionage.

I believe that that is the proof of that objective, to show what information it was that the F. B. I. furnished to the Immigration Service.

It is our contention that it was the Department of Justice which includes the Immigration & Naturalization and the F. B. I. services, who sought this search to obtain evidence of espionage.

It is our contention that as part of the proof to show that it is material, to show what information it was that the F. B. I. turned over to this Immigration officer—

The Court: You contend that there was no sufficient cause for the Immigration Department to cause this arrest?

Mr. Fraiman: Your Honor, I can't make that contention.

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The Court: Of course you can't.

Mr. Fraiman: Until I ask—

The Court: Obviously that is not so. This is not your position, is it?

Mr. Fraiman: Not at this time.

(1333) The Court: I will sustain the objection.

By Mr. Fraiman:

Q. When for the first time, Mr. Schoenenberger, did you ever hear of the individual described in your warrant as Emil Goldfus or Martin Collins? A. Approximately three P. M.

The Court: On what day?

The Witness: On June 20, 1957.

Q. And from whom did you first hear of this subject?

Mr. Maroney: Objected to as having already been covered.

The Court: Sustained.

It has been covered.

Q. You testified, Mr. Schoenenberger, that during the search, conducted by the Immigration & Naturalization Service, there were no special agents of the Federal Bureau of Investigation present. Is that your testimony?

The Court: He said that during the hour that he was there, between seven-thirty and eight-thirty, there was no F. B. I. agent in the room.

Isn't that what you said?

The Witness: That is correct, your Honor.

(1334) Q. Was it during that hour that the search of the room was conducted? A. Yes.

Q. So that no F. B. I. agents were present during the search?

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The Court: That is three times on that.

Mr. Fraiman: Yes, your Honor.

I realize that; but we consider it a fairly important point.

Q. Did you, Mr. Schoenenberger, read the affidavit of Mr. Kevin Maroney, the attorney for the United States Government? A. No, sir.

Q. Are you aware, sir, that in that affidavit, Mr. Maroney says, at the bottom of page five—

Mr. Maroney: Objected to as argumentative.

The Court: If he hasn't read the affidavit, he isn't aware of anything in it.

I will sustain that objection.

I think that would be obvious.

Q. You have never seen the affidavit of Mr. Maroney of September 20th? A. No, sir.

Q. Are you aware of its existence, or of the contents of that affidavit? A. No, sir.

Q. Did you communicate with Mr. Maroney in any way concerning the contents of that affidavit? A. Well; if he included my affidavit in it, I did, possibly; but not to my knowledge.

Q. This affidavit was submitted on September 20th, Mr. Schoenenberger? A. Not to my knowledge. No, sir.

Q. You didn't submit an affidavit prior to September 20th? A. No.

Q. When the subject was taken from the hotel room, he was in handcuffs, was he not? A. That is correct, sir.

Q. Did you ask him if he wished to leave or did you tell him that he was leaving? A. He asked where he was going, I believe.

Q. Did he have any choice in the matter?

The Court: He was under arrest, wasn't he?

Mr. Fraiman: Pardon me?

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The Court: Wasn't he under arrest?

Mr. Fraiman: I presume he was under arrest.

The Court: Why ask him idle questions?

(1336) Mr. Fraiman: The question is not idle, your Honor. In view of—

The Court: All right. It isn't. Go ahead and ask him.

Q. The subject did not leave the hotel room voluntarily, did he? A. I was—

Mr. Maroney: I object, your Honor. The man was arrested.

The Court: Counsel will feel better if he gets a second crack at it.

I pointed out that he was under arrest. Go on.

Mr. Fraiman: Despite that contention, it seems to be the Government's contention based on their other affidavits that the witness voluntarily checked out of his hotel.

The Court: He was under arrest.

Take that from me, will you, please, and proceed from that point?

Mr. Fraiman: I have no further questions of this witness, your Honor.

Mr. Maroney: May I ask one additional question, your Honor?

(1337) The Court: It will be strictly re-cross. It will be confined to matters developed on re-direct.

Re-cross examination by Mr. Maroney:

Q. Would you not answer this until there is an opportunity for an objection?

Were you ever told by anyone, or instructed by any superior to conduct a search?

The Court: Now, you see you are starting off with a two-pronged question: One, were you

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instructed by a superior, that is the one question:
were you told by anybody is another.

Now, break it up, please.

Were you ever requested by anyone prior to the arrest
of the defendant to look for evidence of espionage?

Mr. Donovan: I object, your Honor. It is not
within the scope of your Honor's ruling.

The Court: I think so.

I think you are right, Mr. Donovan.

I will sustain the objection.

Mr. Maroney: No further questions, your Honor.

May the witness be excused, your Honor?

He is from Washington.

(1338) The Court: Oh, yes.

Next witness, please.

Mr. Fraiman: Edward Farley.

EDWARD J. FARLEY, witness called, having been first duly
sworn, testified as follows:

Mr. Donovan: Could we have a five-minute recess,
your Honor?

The Court: Yes.

Five-minute recess.

(A recess was thereupon taken.)

The Court: All right. Proceed, gentlemen.

Mr. Fraiman: Mr. Donovan and Mr. Tompkins
are not here.

Mr. Maroney: I think Mr. Tompkins intended to
be out a few minutes.

The Court: All right. Go ahead.

Mr. Fraiman: May I wait a moment for Mr.
Donovan's return?

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The Court: I would rather that you did not.

I would rather you go ahead and ask the formal questions.

Q. What is your occupation? A. I am a supervisory investigator with the Immigration (1339) and Naturalization Service.

Q. How long have you been with the Immigration and Naturalization Service? A. Over sixteen years, sir.

Q. Where do you perform your duties? A. My official station is at 70 Columbus Avenue, New York City.

Q. How long have you been stationed at 70 Columbus Avenue or in the New York Office of Immigration? A. Thirteen years.

Q. Do you know Investigator Schoenenberger, of Washington, D. C.? A. Yes, sir.

Q. He has described to us what his duties were as a supervisory investigator. I gather, since your title is the same, that your duties are much the same as his? A. No, sir. He is a supervisory investigator on a different level.

Q. I see.

Will you describe yours then on what level you perform your duties and briefly what your duties are? A. I am a supervisor of the Criminal and Immoral and Narcotics Squad in New York, in the New York Office, and I have a group of investigators assigned under me.

(1340) Q. Who is your immediate superior? A. A Mr. Strapp.

Q. What is his first name? A. Everett J.

Q. Mr. Farley, were you on duty as a supervisory investigator on June 20th, 1957? A. Yes, sir.

Q. Some time during that day did you receive a communication from anyone concerning one, Martin Collins or Emil Goldfus? A. I received a communication on that day.

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I don't believe the name was mentioned at the time I received the communication.

Q. Let me rephrase my question.

Did you receive a communication concerning someone suspected of espionage activity on that day? A. No, sir.

Q. Did you receive a communication from someone about someone whom you later learned to be Martin Collins or Emil Goldfus? A. Yes, sir.

Q. From whom did you receive that communication? A. Mr. Flagg.

Q. Would you tell us who Mr. Flagg is? (1341) A. Mr. Flagg is the assistant district director for investigations in the New York office.

Q. At what time on June 20th did Mr. Flagg communicate with you? A. I would say it would be approximately twenty minutes to five or a quarter to five in the afternoon.

Q. Would you tell us what Mr. Flagg's position in the Immigration office is with relation to Mr. Strapp? A. He is Mr. Strapp's supervisor.

Q. He is in effect two levels removed from you? A. Yes, sir.

Q. Would you tell us what the form of the communication was that you had from Mr. Flagg?

Was it an oral conversation, a letter, a telephone call? A. Normally my working day works at five.

As I mentioned prior, this was about twenty minutes or a quarter to five and he called me by telephone and he asked me to stand by. He also asked me if there was also an investigator, whom he mentioned by name, available, and I replied that the other investigator was not available.

Q. Who was the other investigator? What was his name?

(1342) A. Investigator Peters.

Q. Did Mr. Flagg tell you why he wished you to stand by? A. Not at that particular time.

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Q. Did you stand by pursuant to Mr. Flagg's instructions? A. I did, sir.

Q. Did you subsequently see Mr. Flagg? A. Yes, sir.

(1343) Q. What time did you see him? A. About five o'clock.

Q. Did he tell you at that time why he wished you to stand by? A. He said he had received a communication from Washington requesting me to stand by, that we were expecting some people from Washington and I was supposed to meet them.

Q. Is that the full extent of the information that Mr. Flagg gave you? A. Yes, sir.

Q. Did he tell you who you were to meet? A. He mentioned two names.

Q. Will you tell us their names? A. Mr. Kanzler and Mr. Schoenenberger.

This is right, sir.

Q. Did he tell you who had communicated with him from Washington? A. No, sir, he did not.

Q. Did he tell you why you were to meet Mr. Kanzler and Mr. Schoenenberger? A. He said he would be advised further when these people arrived from Washington.

Q. You were given no further information whatsoever at that time about what you were standing by for? A. This is right, sir.

(1344) Q. Were you told who the subject of your pending investigation was going to be? A. No, sir.

Q. What did you do when you received this communication from Mr. Flagg at five o'clock? A. I waited in the office. Mr. Peters, of course, as I mentioned, was not available, so they obtained the services of another investigator who was available.

Q. Who was that? A. Mr. Boyle.

We both stood by and were instructed to go to Newark Airport.

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Q. Who instructed you to go to Newark Airport? A. Mr. Flagg passed those instructions on to us.

Q. Was that also at five o'clock? A. It was after five o'clock, maybe five minutes after five.

Q. What time did you go to Newark Airport? A. We were informed that we were to meet an aircraft that would probably arrive there between eight-thirty and nine P. M.

Q. Did you meet such a plane? A. Yes, it was late.

Q. What time did the plane arrive? (1345) A. I would say approximately ten-thirty p. m.

Q. Prior to your meeting the plane, did you have any additional information other than what you have already told me concerning why you were standing by? A. No, sir.

Q. Did you have any conversations with any members of the Federal Bureau of Investigation during that interim period? A. No, sir.

Q. Did Mr. Boyle to your knowledge, have any such conversations?

The Court: In your presence, that would be?
The Witness: No, sir, he did not.

Q. Did Mr. Flagg to your knowledge have any such conversation? A. Not to my knowledge, sir.

Q. When you got to the airport, I gather that you met Mr. Schoenenberger and Mr. Kanzler? A. That is right.

Q. Where did you go after you met them? A. We went to our New York office at 70 Columbus Avenue.

Q. Did you have a conversation with those gentlemen concerning their presence in New York and concerning what you were to do as a result of their presence? (1346) A. Yes, sir.

Q. Tell us what they said to you at that time? A. They said we were to go into our New York office where we were to meet Mr. Murff, the District Director, and from there we were to go to the F. B. I. office, that there was an alien

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illegally in the United States, whom the F. B. I. had been investigating and that we were to make an arrest of this particular person.

Q. Did they tell you any other details other than that about what you were to do? A. I can't recall any further details driving in from Newark Airport, sir.

Q. When you arrived back at Immigration Headquarters, did you learn any further details? A. Yes, sir.

Q. From whom did you learn such details? A. From the two Immigration officials that came from Washington.

Q. Will you tell us, to the best of your recollection, as much detail as you can, what did they say to you? A. I might put it this way. It wasn't so much as what they said to me, they had a report there and the report described the person who had entered the United States illegally in 1949 from Canada at an unknown port.

Q. What type of a report was this? (1347) A. It—

Q. Was it an Immigration report? A. It was a report furnished to the Immigration Service.

Mr. Fraiman: At this time the defendant asks that the Government produce that report for our inspection.

Mr. Maroney: The Government opposes the motion and thinks that it is immaterial to this hearing.

The Court: Why do you think you are entitled to see the report?

Mr. Fraiman: I think, your Honor, it goes to the very heart of this hearing which is to determine what the objective was of the Department of Justice conducting this search.

I think that report, based upon what Mr. Farley has testified to, would indicate what the information was that the men had which was the basis for this entire investigation.

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The Court: This is not a report made by this witness.

You are not calling for something that you could use on cross examination.

I will sustain the objection and I am going to ask you to take me into your confidence to this extent.

(1348) Is it your theory that the F. B. I., having reason to believe that a given individual has broken the law may approach the solution of the problem by investigating what you might consider a minor offense, there being a major offense in the background? Is that your theory?

Mr. Fraiman: No, your Honor.

The Court: What is it?

Mr. Fraiman: May I explain, your Honor, if I may, it is our theory, your Honor, in arresting this man in the manner in which they did, that is having information that he was a Soviet espionage agent, but not having sufficient information to obtain a warrant charging him with that, but having additional information that he was an alien illegally in the United States—

The Court: And therefore subject to arrest?

Mr. Fraiman: Therefore subject to arrest, your Honor.

The Court: They were not at liberty to arrest him?

Mr. Fraiman: No, your Honor.

They were perfectly proper in arresting him.

We don't contend that at all.

(1349) As a matter of fact, we contend it was their duty to arrest this man as they did.

I think it should show or rather, it showed admirable thinking on the part of the F. B. I. and the Immigration Service.

We don't find any fault with that.

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Our contention is that although they were permitted to arrest this man, and in fact, had a duty to arrest this man in a manner in which they did, they did not have a right to search his premises for the material which related to espionage.

The Court: Had they a right to search for material which related to his illegal presence in the country?

Mr. Fraiman: It is——

The Court: Have they?

Mr. Fraiman: We contend that they did not and in view of the fact that this was not a criminal warrant, it was a warrant issued by the Immigration authorities——

The Court: Is it a violation of law to be illegally in the country?

Mr. Fraiman: I don't know, sir; specifically, your Honor.

(1350) I do know that he was not charged with a violation of law in that warrant.

The Court: Have you consulted title 8, Section 1325, having to do with the entry of an alien at an improper time or place, misrepresentation and concealment of the facts? Have you looked at that?

Mr. Fraiman: I have read it in the past, your Honor.

I haven't read it recently.

The Court: Have you considered Section 1306, penalties of wilful failure to register?

Mr. Fraiman: Yes, your Honor.

The Court: Would that be involved on the part of the alien illegally in the country?

Mr. Fraiman: It may and it may not. He was not charged with that offense in this warrant. He was charged with no criminal offense in this warrant.

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The Court: He was suspected of being illegally in the country, wasn't he?

Mr. Fraiman: Yes, your Honor.

The Court: He was properly arrested.

Mr. Fraiman: He was properly arrested, we concede that, your Honor.

The Court: All right.

(1351) Now, you say that there couldn't be a search made of him or his belongings in behalf of the offense of being illegally in the country?

Mr. Fraiman: It is our contention, your Honor, that a search could not be made pursuant to the warrant for which this man was arrested.

The Court: Why not?

Mr. Fraiman: Because he is not charged with a crime in that warrant.

The only time, it is our contention, that the only time a search can be made pursuant to a warrant is when that warrant charges the commission of a crime.

The Court: When there is an offense, a criminal offense involved on the part—where there is the illegal presence in the country, I think your argument is very difficult to sustain.

Mr. Fraiman: Your Honor, if the Government wished to charge this man with being illegally in the United States, they could have gone to the United States Commissioner and obtained a warrant for his arrest, in which case we certainly don't contend that they could not have searched the immediate premises for the fruits or instruments of that crime.

(1352) But, in view of the fact that they did not proceed in that manner, they did not go to the United States Commissioner and get a United States warrant charging him with that offense, which they had

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an option to do, if they had sufficient information, we contend they could not search on the basis of one of these Immigration warrants which is obtained without any background material at all.

Mr. Donovan: Could I briefly be heard on it, your Honor?

The Court: I wanted to find out what your theory was.

Mr. Donovan: Could I be briefly heard on the same point?

The Court: Go ahead.

Mr. Donovan: What we are seeking, your Honor, to bring home through this hearing is that as your Honor has pointed out, the man was suspected of two crimes: One, illegal entry, and one, espionage.

What we are seeking to point out is that the ordinary legal process that would be followed in pursuit, a person suspected of either one of those two crimes was not followed in this case and what we hope to bring out, your Honor, is in order to show (1353) that the dominant motivation of the Department of Justice within which, or both of these services, the dominant motivation was to keep this entire proceeding as secret as possible.

In other words, your Honor, this civil warrant which was served on the man at the time of his arrest is issued within the Department of Justice, no return is made before a United States Commissioner or United States Judge, and what we are seeking to bring out, your Honor, is that the reason why, despite the fact that two crimes were suspected, they adopted these extraordinary measures were in order to serve the dominant counter-espionage objective of the Department of Justice, which as we will show, your Honor, included having the F. B. I. first, as was

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testified this morning, having the F. B. I. first go in and spend a half-hour with the man before Immigration came in and then as we will develop, your Honor, and show that in effect the civil warrant of arrest and the use of these Immigration officers that they were in effect simply used as pawns, but the legal processes to follow with respect to either one of those two crimes were not followed in order to keep this perfectly secret.

So, we will be clear on this, your Honor, we are (1354) not in any way saying that to do this was reprehensible.

Actually, your Honor, weighing the sentence that could be given the man for illegally entering the United States against the opportunity of possibly persuading one believed to be a top Soviet agent to come over to our side, obviously it would be far more in the national interest to follow that course.

Our only point is, if your Honor please, that having gone down that road, the road of counter-espionage in which it is for that you keep it as secret as possible and having taken that gamble for weeks down in Texas, and lost; then you cannot come back up the other road to follow as though you had issued a criminal warrant.

That in substance is the object of our hearing today, because we believe that under the Supreme Court decision, in that event, that this was not conducted in what the Supreme Court calls good faith and accordingly under the Harris Case, that the search and seizure was illegal.

The Court: Thank you for explaining your views to me.

We will take a recess until two o'clock.

(1355) I should be very reluctant to have any Court assume the function to tell the F. B. I. how to perform their functions.

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I think it is the job of the F. B. I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function.

Mr. Donoval: Even if we show, your Honor, that the—they are proceeding in a way that violates the Constitution of the United States?

The Court: I am not deciding the motion.

I am just telling you that that is the extreme attitude that you want the Court to take.

Recess until two o'clock.

(Luncheon recess.)

(1356)

AFTERNOON SESSION.

EDWARD J. FARLEY, resumed the stand and testified further as follows:

Direct examination (continued) by Mr. Fraiman:

Q. Mr. Farley, before we adjourned for lunch, you mentioned that when you had arrived back at Immigration Headquarters with Mr. Schoenenberger and Mr. Kanzler, you discussed further what you were to do in the immediate future; is that correct? A. That is right, sir.

Q. You also mentioned that you had seen—you were shown at that time a report concerning the subject who was to be investigated? A. That is correct, sir.

Q. Who showed you that report? A. Mr. Schoenenberger.

Q. Had he brought it up from Washington with him, to your knowledge? A. I assume—

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The Court: Did he say? Did he say to you whether he brought it from Washington?

The Witness: No, sir, he did not.

(1357) By Mr. Fraiman:

Q. You didn't see him receive it from anybody else?

A. No, sir.

Q. Did you examine this report? A. Yes, sir.

Q. Was it prepared by or could you tell from examining it whether it had been prepared by an agent or an officer of the Immigration Service? A. I believe it was prepared by the Federal Bureau of Investigation.

Q. From your examination of that report could you tell who in the Federal Bureau of Investigation had prepared it? A. I don't recollect that, sir. I do not recall seeing a signature on the report.

Q. Had you seen—in your years of experience with the Immigration authorities, you have seen the so-called F. B. I. reports, have you not, that are submitted by special agents? A. Yes, sir.

Q. Was this such a report? A. No, sir.

Q. Would you describe, without going into the contents of the report, exactly what this report consisted (1358) of?

Mr. Maroney: Objected to as immaterial, your Honor.

The Court: Do you mean how many pages?

Mr. Fraiman: Yes, and what its format was.

The Court: Why?

Why do you ask the question?

Mr. Fraiman: Your Honor, I would like to ascertain as best we can who prepared this report.

The Court: The witness doesn't know. He said he didn't see any signature.

Mr. Fraiman: What I am trying to ascertain, your Honor, is whether it was prepared by a single individual so we may call that individual.

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The Court: He said he didn't see any signature.

Mr. Fraiman: From the format I am going to ask—

The Court: If he did know, I don't think I would allow you to produce it. This man was arrested for violation of the law, period.

Mr. Fraiman: Your Honor, it is the defendant's contention that he was not charged with a violation of the law when he was arrested. That is our position.

(1359) The Court: I haven't heard any testimony to that effect yet.

Mr. Fraiman: I will try to elicit that at this time, your Honor.

By Mr. Fraiman:

Q. Mr. Farley, would you tell us the subject of your discussion that evening at Immigration Headquarters? A. Mr. Kanzler, Mr. Schoenenberger, Mr. Murff, Mr. Boyle and myself were present in the District Director's Office. At that time Mr. Murff signed the order to show cause and the warrant of arrest.

Q. Where did they come from, the order to show cause and warrant of arrest?

The Court: We know where the order to show cause and warrant of arrest came from. Mr. Schoenenberger told you.

By Mr. Fraiman:

Q. Now, did that order to show cause and warrant of arrest charge the subject with the commission of a crime?

The Court: Isn't that in evidence?

Mr. Maroney: Objection, your Honor. I think the warrant speaks for itself.

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The Court: Isn't the order to show cause and the warrant in evidence?

(1360) Mr. Fraiman: I believe they are affixed as part of an exhibit to an affidavit, your Honor.

The Court: I think so. I think so. They speak for themselves.

Mr. Fraiman: I was merely bringing this out in respect to your Honor's inquiry.

The Court: They speak for themselves, if you are interested in their contents.

Mr. Donovan: Your Honor, may I ask a question at this time?

Under this proceeding, should we assume that all of these affidavits submitted both in support and in opposition to our application under Rule 41-E are part of the record of this hearing?

The Court: Yes, sir.

Mr. Donovan: Thank you.

By Mr. Fraiman:

Q. How long did you remain at the Immigration Headquarters in the company of Mr. Schoenenberger and Mr. Kanzler? A. I would say approximately a half-hour.

Q. Where did you go after that? A. Thereafter we went to the F. B. I. building, New York City.

(1361) The Court: May I interrupt you long enough to ask a question?

Mr. Fraiman: Surely, your Honor.

The Court: According to this order to show cause, one Martin Collins is charged with a violation of Section 241 (a) (5) of the Immigration and Nationality Act.

What is the reference to the United States Code? What is the equivalent? Does anybody know?

Mr. Maroney: 1251, your Honor.

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The Court: 1251?

Mr. Maroney: Yes, sir.

The Court: Thank you. Sorry to interrupt.

By Mr. Fraiman:

Q. At whose suggestion or at whose direction did you go to the F. B. I. Headquarters, Mr. Farley? A. I went there at the instructions of Mr. Schoenenberger.

Q. At what time did you arrive at F. B. I. Headquarters? A. I would say approximately, around midnight or between midnight and twelve-thirty.

Q. That would be twelve-thirty the morning of June 21st? (1362) A. That is right, sir.

Q. I gather that at the F. B. I. Headquarters you saw a number of agents of the F. B. I.? A. I did, yes, sir.

Q. Was there any single agent who was in charge of the group of agents whom you saw at that time?

The Court: Are you speaking of the Immigration Department agents?

Mr. Fraiman: No, your Honor. The F. B. I.

The Witness: There appeared to be one person in charge.

By Mr. Fraiman:

Q. What was his name?

The Witness: Tom McAndrews.

Q. Do you know what his position was or is? A. I don't know what his title is, but I assume he was the supervisor over the agents who were present.

Q. Will you tell us what was said with respect to the person whom you knew as Martin Collins or Emil Goldfus at the F. B. I.? A. Discussion was held to formulate what

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action was to be taken that morning in connection with the arrest of Martin Collins.

Q. And who made the determination as to what action (1363) was to be taken?

The Court: Who made?

I think you mean who issued the instructions, don't you?

Mr. Maroney: If he knows.

Mr. Fraiman: No, your Honor.

The Court: All right.

Mr. Maroney: If he knows, it should be, your Honor.

The Court: All right.

The Witness: The two principals who were at this meeting decided between themselves as to what action was to be taken.

That was Mr. Schoenenberger representing the Immigration Service, and Mr. McAndrews representing the F. B. I.

Q. They decided between them what action was to be taken? A. That is right, sir.

Q. Were you present when this discussion took place between— A. Yes, sir.

Q. —Mr. McAndrews and Mr. Schoenenberger? A. Yes, sir.

(1364) Q. Will you tell us to the best of your recollection what was said by Mr. Schoenenberger and what was said by Mr. McAndrews? A. Mr. McAndrews indicated that agents would enter the hotel room wherein Martin Collins resided at the Hotel Latham and they would talk to him in an effort to have him cooperate with them; that we would be present as Immigration officers with the warrant of arrest to take him into custody.

Q. At what time did you proceed to the Hotel Latham? A. I would say shortly before seven A. M.

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Q. Where had you spent the hours between 12:30 and 7:00 A. M., sir? A. At the F. B. I. office.

Q. Did they provide sleeping facilities for you at the office of the F. B. I.? A. They did, sir.

Q. What other members of the Immigration Service spent that night at the F. B. I. Headquarters? A. Mr. Boyle, Mr. Kanzler, Mr. Schoenenberger, and myself.

Q. Whom were you with when you went to the Hotel Latham at seven in the morning of the 21st of June? A. I was with Mr. Boyle.

(1365) Q. Had arrangements been made for you to meet anyone at the Hotel Latham? A. Yes, sir.

Q. Whom were you to meet? A. We were to meet the F. B. I. agents who were assigned to the case.

Q. Who had told you that you were to meet those agents? A. This was discussed at the meeting that I mentioned before between Mr. Andrews—McAndrews—and Mr. Schoenenberger.

Q. Mr. McAndrews, as I understand it, was connected with the F. B. I.? A. That is right, sir.

Q. Did you meet certain agents of the F. B. I. when you arrived at the Latham? A. Yes, sir.

Q. Whom did you meet? A. Well, there was Special Agent Gamber, Special Agent Blasco, Special Agent Green, Special Agent Phelan. There may have been one or two other agents, but I don't recall their names offhand.

Q. So that there were approximately six agents of the Federal Bureau of Investigation whom you met? (1366) A. I would say approximately that number, sir.

Q. Where did you meet them? A. I met them in the hall or the corridor on the eighth floor and also in an adjoining room to where Martin Collins was residing, which was a room a short distance down the hall.

Q. Mr. Collins, as we understand, was in Room 839 and you met these agents in the hallway and a room adjoining 839? A. 841, I believe the other number was.

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Q. Was that an unoccupied room? A. It was occupied, sir.

Q. Occupied by whom? A. By the F. B. I.

Q. There weren't any guests in the room—paying guests? A. No, sir. Not to my knowledge.

Q. Do you know, incidentally, how long those F. B. I. agents had been in that room? A. I don't know, sir.

Q. Approximately what time did you arrive at this Room 841 where you met the F. B. I. agents? A. I would say shortly after seven A. M.

Q. Will you tell the Court what happened when you (1367) arrived at that room? A. I went into the room with Mr. Boyle and we just stood by in the room, and we were there approximately fifteen to twenty minutes when one of the F. B. I. agents motioned to us that they had completed their business with Martin Collins, and we were to go in and effect the arrest.

Q. Was that the prearranged agreement that you would wait outside until they had had an opportunity to question the subject? A. Yes, sir.

Q. How many agents of the F. B. I. went in to question the subject while you waited outside? A. I couldn't tell, sir. I was in another room.

Q. Let's see. You said that there were a total of six agents that you met in the lobby of the hotel? A. That's right, sir.

Q. Did all six of the agents go up to Room 841 with you? A. No, sir.

Q. How many of them went up to Room 841? A. I believe two, sir.

(1368) Q. Will you tell us who they were? A. I believe one was Special Agent Green; the other one I can't recall his name, sir.

Q. It wasn't Blasco or Gamber or Phelan? A. I don't believe that they were in the room with me during that time.

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Q. Do you know who went into the room originally—Room 839, that is?

Mr. Maroney: Objection.

By Mr. Fraiman:

Q. (Continuing) —while you waited outside?

Mr. Maroney: He has already testified that he didn't know who went into Room 839.

Mr. Fraiman: He testified that he didn't know how many agents went into the room.

The Court: If he was there when they entered the room he would be able to say what men he saw go in.

Mr. Maroney: That is right, your Honor, but I think that he testified he wasn't there. He was in an adjoining room.

The Court: That is my understanding.

Mr. Fraiman: If that is the answer, I am bound by that answer.

(1369) By Mr. Fraiman:

Q. Did you see who went into the room? A. No, sir.

Q. Could you tell me approximately how long it was you waited in Room 841? A. I would say between fifteen and twenty minutes.

Q. Who was it that told you that it was then permissible for you to go into the room—that is, Room 839?

The Court: I don't think he has testified anybody said it was permissible.

By Mr. Fraiman:

Q. Did somebody come at a certain point and tell you that you could go into Room 839? A. A special agent came to the door of the room where I was. That was it.

*Excerpts of Hearing on Motion to Suppress.**Edward J. Farley, for Defendant—Direct.*

Q. Who was that? A. I can't recall which agent that was, sir, but he made a motion that we were to go into Room 839.

Q. He motioned you to go into Room 839? A. Yes, sir.

Q. And as a result of that you went into Room 839? A. That is right, sir.

Q. With whom? (1370) A. With Mr. Boyle.

Q. When you went into 839 who was in the room? A. Two agents that I recall. Agent Gamber and Agent Blasco.

Q. Those are agents of the F. B. I.? A. That is right, sir.

Q. Was the subject in the room? A. He was, sir.

Q. Incidentally, how was the subject dressed when you went into the room? A. In undershorts, sir.

Q. Did he have any other clothing on? A. No, sir.

Q. Could you describe for the Court, Mr. Farley, the physical set-up of that room, its approximate size? A. I would say the room, to the best of my ability, would be about 12 feet by eight feet with an adjoining bathroom; that as you entered the door to the room there was a closet to the right; there was a bed in front of the closet—appeared to be a large size or double bed.

There was a small desk, a small night or end table, a chest of drawers, and a collapsible luggage rack.

Q. So that it was a relatively small-sized single hotel room? (1371) A. That is right, sir.

Q. If I may go back just a moment, Mr. Farley, you told us that while you were at the F. B. I. headquarters Mr. McAndrews said that the F. B. I. would enter first and try to get the subject to cooperate? A. That is right, sir.

Q. Did he elaborate in any way as to what he meant by cooperating? A. He did not, sir.

Q. Was there any discussion, Mr. Farley, as to what course of action you would pursue in the event the subject did cooperate? A. No, sir.

Q. What did you do when you first entered Room 839, Mr. Farley? A. I stood by while Mr. Boyle served Martin

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Collins with the order to show cause and the warrant—warrant of arrest issued by the United States Immigration Service.

Q. And what did you do after that? A. I asked Martin Collins to stand up, and I examined the undershorts and then told him to get dressed; asked him if he wanted to wear any particular suit.

Q. Just for the record, Mr. Farley, is the man whom you have spoken of as Martin Collins presently in the court- (1372) room? A. He is, sir.

Q. Would you identify him, please? A. This gentleman right back here, sir (indicating), the second seat back.

The Court: Sitting behind Mr. Donovan?

The Witness: That is right, sir.

Mr. Fraiman: May the record indicate the witness has identified Rudolf Abel as the man whom he knew as Martin Collins?

By Mr. Fraiman:

Q. What did you do after you spoke to the subject, Mr. Farley? A. Well, I asked him if he had any choice of any particular suit that he wished to wear, and he indicated by pointing to one suit which was hanging up by the closet.

The suit was taken down and searched. After the suit was searched, it was handed to him to wear.

And the undershirt he selected was also searched before it was handed to him.

Q. What did you next do, Mr. Farley? A. I commenced with Mr. Boyle to search the room for any nationality documents I might find or any weapons that could be used as against either myself or that Martin (1373) Collins may use against his own self, sir.

Q. You searched the room for nationality documents or weapons? A. That is right, sir.

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Q. Did you find any nationality documents? A. I did not, sir.

Q. Did you find any weapons? A. I did not, sir.

Q. How long a time did this search take? A. The search, I would say, took perhaps fifteen or twenty minutes.

Q. In the course of this search, were Agents Gamber and Blasco in the room? A. No, sir.

Q. You testified that they were in the room when you came in. At what point did they leave the room? A. When we took over to effect the arrest they backed out of the room, remained in the hallway.

Of course, the door was open to the room so that they were visible from the room.

Q. They were standing in the hallway visible? A. Inside the room.

Q. From inside the room? A. Yes, sir.

(1374) Q. So that they were in a position where they were able to observe your searching the room; is that correct? A. That is right, sir.

Q. As a matter of fact, this room was extremely crowded at that point, was it not, when you came into the room? A. It contained, I believe, the two special agents when Mr. Boyle and myself entered the room, but as we took over they backed out and remained in the doorway.

Q. As a matter of fact, you were joined shortly after you entered the room by Mr. Kanzler and Mr. Schoenenberger, were you not? A. That is correct.

Q. So that there were four Immigration and Naturalization officers in the room? A. That is right.

Q. And there was the subject? A. That is right.

Q. That was five people? A. Correct, sir.

Q. In a room approximately eight by twelve feet? A. Yes, sir.

Q. So the F. B. I. officers were standing in the doorway of the room rather than inside the room?

*Excerpts of Hearing on Motion to Suppress.**Edward J. Farley, for Defendant—Direct.*

(1375) The Court: He said that they were standing in the hall.

By Mr. Fraiman:

Q. Would you tell us how far from the door approximately they were standing, Mr. Farley? A. I would say right close to the door jamb or doorway.

Q. And at that point, when they were standing there, there were five of you inside the room—a total of five people? A. That is right, sir.

The Court: By five of you, do you mean five Immigration officials or do you mean four?

Mr. Fraiman: I mean four and the subject, your Honor. A total of five persons in the room.

By Mr. Fraiman:

Q. Now, at some point while you were in the room, Mr. Farley, I gather from your affidavit of, I believe, September 30, you asked the subject whether there was anything in the room which he did not own; is that correct? A. That is right, sir.

Q. And he replied that there was not? A. That is right, sir.

Q. At some point in the course of your search did (1376) you have occasion to say anything to the agents of the F. B. I. who were standing at the door? A. Not during the course of the search.

Q. Did you have occasion to speak to the agents after you had completed your search?

Mr. Maroney: Objection, your Honor. About what, I would inquire?

The Court: I don't know what is in counsel's mind, but I prefer to allow the question.

*Excerpts of Hearing on Motion to Suppress,
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The Witness: At the termination of the packing,
I had occasion to talk to one of the special agents.

By Mr. Fraiman:

Q. Where was he standing at the time? A. He was just at the entrance to the room, at the doorway.

Q. What did you say to him? A. I asked him to go to the desk and get Mr. Collins' bill.

Q. Prior to doing that, did you ask Collins if he wanted to check out of the hotel? A. No, sir.

Q. Pursuant to your request did the agent of the F. B. I. go and obtain a bill? A. A receipted bill came back, sir.

(1377) Q. Prior to his going, did you ask the subject how much money he owed? A. I did, sir.

Q. What was his reply? A. I believe he said that he owed the hotel \$21.

Q. Did he explain how he computed that figure? A. He did not, sir.

Q. What happened when the agent of the F. B. I. returned with the receipted bill? A. It was handed to Mr. Collins.

Q. Did you note how much the bill actually was? A. No, sir, I did not.

— Q. You know in fact, don't you, Mr. Farley, that the bill was a little over \$25?

Mr. Maroney: Objected to as argumentative, your Honor.

The Court: He may be asked if he knows. I don't know what difference it makes.

Mr. Maroney: I think he just answered that he didn't know what the bill was.

Mr. Fraiman: He answered that he didn't see the receipted bill.

The Witness: I understand the—

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The Court: No. Did you look at the bill?

(1378) The Witness: No, sir, I did not.

The Court: Then you don't know what the amount of it was?

The Witness: No, sir.

The Court: Of your own knowledge, you don't know?

The Witness: That's right, sir.

The Court: Next question.

By Mr. Frauman:

Q. Who had custody of the money that was found in Mr. Collins' room? A. You mean at the time I was present in the room or—

(1379) Q. Yes. A. There was no money taken from Mr. Collins.

It is customary when we make a search of that nature, that if there is any money involved, we let the person we are taking into custody hold their own funds.

Q. Are you saying, Mr. Farley, that you permitted the subject to retain all the money that was in that room? A. At that—

Q. When he left the room? A. Yes, sir.

Q. Over \$5,000? A. I didn't know there was that amount there at the time, sir.

Q. You searched the subject, did you not? A. Yes, sir.

Q. Do you know who paid for the hotel bill? A. Mr. Collins paid it, sir.

Q. He turned money over to someone? A. That's right, sir.

Q. In your presence? A. That is right, sir.

Q. Did you see how much money he turned over? A. I didn't count the amount of money, sir.

Q. Do you know, approximately how much money he turned (1380) over from watching him turn this money

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over? A. I can only assume that it was twenty some odd dollars.

Q. Whom did he turn it—the money—over to? A. I believe he handed me the money and I handed it to the special agent.

Q. But you did not count the money? A. No, sir.

Q. Was this after the special agent brought back the receipted bill? A. I believe I asked Mr. Collins how much he owed the hotel.

As my memory serves me, he said something to the effect of about \$21.

I picked up the telephone, and I asked the desk clerk to prepare a bill for Mr. Collins.

Q. You asked that a bill be prepared for Mr. Collins? A. That is right, sir.

And the special agent went down to the desk clerk, received the receipt brought the receipt up.

Q. There couldn't have been a receipt until somebody had paid some money, could there? A. That is the bill, I mean to say. He brought the bill up.

(1381) Then Mr. Collins paid the money for the bill. The bill was then taken back down to the desk clerk who receipted it as paid.

Mr. Fraiman: Your Honor, I wonder if at this time the Government will stipulate the amount of the bill was approximately \$25?

I believe they have a copy of the bill.

Mr. Maroney: We would be glad to check it and then stipulate, your Honor. I don't know, as a matter of fact.

The Court: As long as we have got the facts to show them.

Mr. Fraiman: I merely wish to bring out through this witness that the hotel bill was for an additional day more than the subject thought that he owed.

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The Court: Is that important?

Mr. Fraiman: I believe it is important, your Honor, in this—

The Court: Don't tell me why. Go ahead.

By Mr. Fraiman:

Q. Could you tell us approximately, Mr. Farley, the total length of time that you were in the hotel room?

The Court: In Room 839, you mean?

Q. In Room 839, yes. (1382) A. I would say between an hour and an hour and fifteen minutes.

Q. You told us the search consumed approximately fifteen minutes, is that right? A. That is right, sir.

Q. Will you tell us what took up the remainder of the time? A. Packing.

Q. Anything else? A. Just packing, sir.

Q. At the conclusion of that time, what happened, Mr. Farley? A. We took Mr. Collins with his personal effects down to East 27th Street where there was an Immigration car parked.

Q. He was handcuffed at the time, was he not? A. Yes, sir. He was in custody.

Q. As a matter of fact, he was in custody from the moment that you served the warrant of arrest on him? A. That is correct, sir.

Q. While you were present in the room with Mr. Schoenenberger and Mr. Kanzler, at any time did you see the subject attempt to conceal any documents anywhere? (1383) A. No, sir.

Mr. Fraiman: I have no further questions.

Cross examination by Mr. Maroney:

Q. Mr. Farley, you stated on direct examination that during your wait in room 841 prior to your entry into Room

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839 that you were motioned by an F. B. I. agent to come into 839; is that correct? A. That is right, sir.

Q. Now, was that by pre-arrangement that that was made at the conference the preceding night between Mr. McAndrews of the F. B. I. and Mr. Schoenenberger of I & S?

A. That is right, sir.

Q. So that if I understand you correctly, Mr. Schoenenberger who was the senior I & S officer present at the conference—he had entered into an agreement to that effect with the F. B. I.; is that correct?

Mr. Fraiman: Objection, your Honor.

The Court: Well, do you object to the use of the word "agreement"?

Mr. Fraiman: Yes, your Honor.

The Court: So do I.

That was the common understanding, was it?

(1384) The Witness: Yes, sir.

By Mr. Maroney:

Q. Now, I think you were also asked as to whether any conversation took place at a conference at about midnight on June 30th as to what would have happened in the event that the defendant had cooperated during the interview?

A. Yes; that is right.

Q. Is that right?

Now, did you at any time prior to placing the defendant under arrest receive any instructions as to whether the arrest was to be made on a contingent basis?

Mr. Fraiman: Objection, your Honor.

The Court: I will allow it.

The Witness: No, sir.

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By Mr. Maroney:

Q. In other words, Mr. Farley, what was your purpose in going to the Lathan Hotel on June 21, 1957?

Mr. Fraiman: I believe that the witness has already testified to that, your Honor.

The Court: I think there is only one inference as to why he was there.

Mr. Maroney: I agree, your Honor.

Mr. Fraiman: I think he was seeking evidence of (1385) alienage, your Honor.

The Court: I didn't hear you.

Mr. Donovan: I said, sir, I think that he was seeking evidence of alienage. In other words, the same point which we had up this morning.

By Mr. Maroney:

Q. Mr. Farley, in your affidavit which you have previously submitted in connection with this very proceeding, you stated that during the search that was conducted by you and Mr. Boyle of Room 839 on the morning of June 21, 1957, that you made an effort to discover any items, and I am quoting from your affidavit, page three, "Made an effort to discover any items or documents which would reflect upon the identity and nationality of the individual arrested."

Do you recall that statement in your affidavit? A. I do, sir.

Q. Is that statement correct, true, that during your search you were looking for items reflecting the identity of a person being placed under arrest?

Mr. Fraiman: I object, your Honor. The witness has already testified that he was looking for documents relating to nationality.

If this is an effort to impeach a Government agent, (1386) then I would have no objection.

*Excerpts of Hearing on Motion to Suppress.**Edward J. Farley, for Defendant—Cross.*

The Court: Do you understand there is any difference between what you say his testimony was and his statement in the affidavit? Aren't they the same thing?

Mr. Fraiman: I believe they are basically the same, your Honor.

The Court: That is what I think.

And you examined him on the subject on direct.

Mr. Fraiman: Yes, your Honor.

The Court: Now he may be cross examined on the same subject.

Mr. Fraiman: Yes, your Honor.

By Mr. Maroney:

Q. So is that a correct statement, Mr. Farley, that you were in fact during your search of the hotel room looking for items which would reflect the identity of the person being placed under arrest? A. That is correct, sir.

Q. Did you or the other officers making the search with you find any such items during the search of the hotel room if you recall?

Mr. Fraiman: I believe the witness already answered that in the negative, your Honor.

(1387) The Court: He has, and I think that gives counsel the right to cross examine him on the subject. He has already said that he did not.

Mr. Maroney: Your Honor, I think there has been—

The Court: Don't argue. Go ahead and ask him a question.

I have overruled the objection.

By Mr. Maroney:

Q. Do you recall any such documents, Mr. Farley? A. I do not recall seeing such documents, sir.

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Q. Now, I don't recall whether you testified on direct examination—I think you did testify as to the subject but I don't recall your answer—as to whether or not any F. B. I. agents were in the room during the time that you were in the room, 839, on that morning? A. They were not, sir.

When we took over to effect the arrest, they backed out.

Q. In other words, they were there when you entered? A. Yes, sir.

Q. And then they left, is that right? A. That is right, sir.

Q. Did any F. B. I. agents take part in the search (1388) that was conducted of the defendant's effects in the hotel room? A. No, sir.

The Court: You mean during that hour?

Mr. Maroney: During that hour, yes, sir.

The Court: How could they if they weren't in the room?

Mr. Maroney: They were there at the outset, your Honor, for a short time.

The Court: He said they backed out as he and the other Immigration officials went in.

Isn't that right, isn't that what you said?

The Witness: That is right, sir.

By Mr. Maroney:

Q. Now, Mr. Farley, one final question. Were you instructed, prior to placing the defendant under arrest, to make a search for evidence of espionage? A. Definitely not, sir.

Mr. Maroney: No further questions, your Honor.

Mr. Donovan: May it please the Court, the defense would have no further questions to ask this witness.

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

However, the witness has testified that he read a report of the Federal Bureau of Investigation, which was furnished to the Immigration Service and which, (1389) to the best of his understanding, is the entire basis of the action taken——

The Court: I didn't hear——

Mr. Donovan: —by the Immigration.

The Court: —him say that it was the entire basis of anything.

I have once told you that that report is not going to be produced so far as I am concerned. If you want to re-argue it, go right ahead and re-argue it.

Mr. Donovan: No, your Honor. However, it would appear that under these circumstances that we have been seeking to bring out in seeking to support the arguments which I made to you again just before lunch, that this report could well be determinative as to what was the dominant objective of the Government with respect to the search and seizure.

Under these circumstances, while I understand that your Honor has ruled that we may not see this report, may I respectfully request that, at a minimum, that the Court review this memorandum in order to determine its relevance to what is before your Honor for determination?

The Court: Mr. Donovan, I don't think that you come within the statute recently enacted. I have got (1390) a copy of it.

Now, I am willing to assume, for the sake of argument and not otherwise, that the F. B. I. having certain information decided to proceed by indirection instead of by frontal attack.

I do not concede that they are open to criticism for doing that. I do not concede that that furnishes

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

any support for the existing motion, but I am not deciding the motion.

Mr. Donovan: Will the Court review the memorandum?

The Court: I see no reason why I should.

I am willing to assume, for the sake of argument, that the memorandum would disclose suspicious circumstances and the exercise of deliberate judgment that at the instant of time it was not wise or feasible to proceed directly, that it was in the interest of the United States to proceed indirectly.

I assume that for the sake of argument. I do not know whether or not it is so and I don't consider it highly important.

Mr. Donovan: We of course believe it very important, your Honor.

The Court: I understand that. I have understood (1391) stood right along you considered it important.

Now, have we another witness?

Mr. Fraiman: May I state, your Honor; it is not our objective in seeking this report to impeach the credibility of any witness.

The Court: That is the only subject that the new statute has in mind.

Mr. Fraiman: Our object, your Honor, in obtaining the report is not under Section 3500 of Title 18, but it is, rather, under the best evidence rule.

There has been reference made to that report, —that is, to the information that the F. B. I. furnished to the Immigration & Naturalization Service. We now learn that that information was contained in a report.

We respectfully submit that is the best evidence of what was translated to the Immigration Service.

The Court: I will try again.

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

I do not think that it is any concern of the Court on this motion what that information was. I am willing to assume, for the sake of argument, that suspicious circumstances were known to the F. B. I. and that in the exercise of the best judgment (1392) of the F. B. I. the situation was not then in such a condition that a frontal attack could be made but the interest of the United States required that an indirect approach be made.

I am willing to assume that.

Now, can we go on from that point?

Mr. Fraiman: I respectfully except, your Honor.
The Court: Surely.

Mr. Donovan: May I simply add this, your Honor, that this is not a situation in which we are considering whether it would be in the best interest of the United States to arrest directly or by indirection for some lesser offense.

In other words, in this case your Honor appreciates that no arrest, even a civil arrest, was made until after the F. B. I. had spent that period in the room.

The Court: Therefore?

Mr. Donovan: Therefore, your Honor, we believe that this report can very well be determinative not only with respect to what the F. B. I. was asking Immigration to do in the event that the subject did not cooperate, but in all probability the reason why they were to remain outside was that no arrest (1393) would be made in the event that the subject would cooperate; and we believe that is very pertinent for your Honor's consideration of the subject matter of this motion.

The Court: Now, have you stated your views?

Mr. Donovan: Yes, your Honor.

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

The Court: Will you go on with the next witness, please?

Mr. Fraiman: We have completed our examination of this witness, your Honor.

(Witness excused.)

The Court: Will you go on with your next witness?

Mr. Donovan: May we have just a moment?

Mr. Maroney: Your Honor, may we make one statement in connection with the previous argument?

First of all, I think the evidence in the record shows that it was a fact memorandum and in no way—I don't think there was any indication it concerned the search at all, or as to what would be done on the search.

Now, if counsel is willing to follow the procedure of having the Government submit the memorandum to the Court for a determination of whether there (1394) is anything in there other than facts relating to the alien status and his possible implication in espionage and no information concerning or in any way reflecting on a search or an apprehension, I think the government would be prone to seek authority to submit the memorandum to the Court for that determination, if that is satisfactory to Mr. Donovan.

We do not think they have made any showing, but in this particular instance, I think we would be willing to try to follow that procedure.

Mr. Donovan: First, of course, your Honor, I have made the point that we do believe that we have the right to see the memorandum.

However, your Honor has ruled against me on that several times.

Accordingly, my last suggestion was that in any event as a minimum would the Government permit the Court to inspect this memorandum.

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

Now, suffice to say, your Honor, I would believe that it will make the principal point we are seeking to make if it simply devotes two words to saying "A Soviet alien," and then the remainder of the memorandum deals with what Mr. Schoenenberger described (1395) this morning, but rather in extenso; that is, he was a Soviet colonel suspected of espionage, et cetera.

Mr. Schoenenberger has described that this morning, as, in substance, his important recollection of what was given him by the F. B. I.

I will abide, of course, by whatever your Honor rules.

The Court: Now, assume that I yield to your suggestion and the Government consents that I read the memorandum.

Mr. Donovan: Yes, your Honor.

The Court: What do you think the outcome of that process will be?

Mr. Donovan: I have no idea, your Honor.

The Court: What could it be?

Mr. Donovan: But I do—

The Court: What could it be?

Mr. Donovan: I do feel, your Honor, that you may well, after reviewing it, believe that we should see it and that it should be reflected in your Honor's decision.

The Court: If you are optimistic—

Mr. Donovan: Perhaps your Honor might even (1396) make it a part of the record, but under seal.

The Court: If you are optimistic enough to think that that would be the result and the Government doesn't oppose your application, I will simply defer to what you gentlemen say and I will examine the memorandum produced, but I am not willing to have any time elapsed which will delay our proceeding next Monday morning.

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Direct.*

And don't tell me that it is hidden away under four other documents.

Mr. Maroney: No, sir.

We don't contemplate any such thing; and as a matter of fact, there is a copy of it upstairs, and it would just be a matter of getting authorization.

The Court: If the defense asks me to look at it and you consent, I think that it is my duty to do it, but I don't see any useful purpose to be served.

Mr. Fraiman: Your Honor, may we have it made a part of this record under seal?

The Court: What do you mean? Made a part of this record?

This report?

Mr. Fraiman: Yes, your Honor.

(1397) The Court: Of course not.

It is a record of the F. B. I., and I have been trying to tell you, not with any degree of success. I do not consider it forms any part of this record.

I have been trying to make that clear.

Mr. Fraiman: We have no objection to it going under seal; and we don't see it, if your Honor feels we are not entitled to see it.

The Court: All right. All right, have you another witness?

Mr. Fraiman: Yes, your Honor.

The Court: Please call him.

(1398) LENNOX KANZLER, a witness called on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Fraiman:

Q. Mr. Kanzler, will you tell us briefly what your occupation is, where you perform your duties, and how long you have performed such duties? A. I am a divisional

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Direct.*

investigator with the Immigration & Naturalization Service, and I am assigned in the Central Office special investigative division in Washington.

Q. Have you been so employed, sir? A. In that capacity I have been a little over one year.

Q. What were you prior to that time? A. I was a special inquiry officer prior to that time.

Q. Mr. Schoenenberger is your immediate superior, Mr. Kanzler? A. Yes, he is.

Q. Mr. Kanzler, when for the first time did you hear the name Martin Collins or Emil Goldfus? A. I believe it was the afternoon of June 20th. June 20th is the date.

Q. Will you tell us the circumstances—

The Court: June 20th, 1957?

(1399) The Witness: 1957, sir.

By Mr. Fraiman:

Q. Will you tell us the circumstances surrounding your hearing that name? A. Yes. I was instructed by Mr. Noto to accompany he and Mr. Schoenenberger to the office of the Bureau in Washington.

Q. What Bureau? A. The Federal Bureau of Investigation in Washington.

Was told that there was some information there that would possibly spell out a deportation case.

We went to the office of the Federal Bureau of Investigation.

Q. Approximately what time was that in the afternoon? A. It would be some time late in the afternoon of June 20th. I am not sure.

Q. Three or four o'clock? A. Approximately that time, yes.

Q. You went to the F. B. I. office pursuant to Mr. Noto's instructions? A. That is correct, sir.

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Q. He has been identified previously as a deputy director of the Immigration & Naturalization Service? A. (1400) He is deputy assistant commissioner; that is correct.

Q. Deputy assistant commissioner, excuse me.

And you and Mr. Schoenenberger and Mr. Noto all went to the F. B. I. Headquarters? A. Correct, yes.

Q. Whom did you see when you got there? A. I can't give you the identities of the officers. I just don't recall their names.

I do recall that Mr. Papich, Sam Papich, liaison officer, came with us or met us there, rather.

Q. Will you spell his name? A. Again, I am going to have to guess a little. I think it is P-a-p-i-c-h.

Q. He is the liaison officer between the Immigration service and the F. B. I.? A. I believe he is. I know that he contacts our office frequently.

He was present and there were several others there whose names I can't recall. I don't know them.

Q. Mr. Papich is with the F. B. I.? A. Mr. Papich is with the F. B. I., yes.

Q. Do you know the title of any person you saw? Could you tell us that? (1401) A. No, I don't. I don't know their titles.

Except that I was informed that they were special agents or agents of the Federal Bureau of Investigation, but their precise titles I just don't know.

Q. Let me ask you this: Do you know if Mr. Schoenenberger knows their identity?

The Court: Do you know what?

Mr. Fraiman: I asked him if he knew if Mr. Schoenenberger knew their identity?

The Court: Please don't ask him to be a mind-reader.

You had Mr. Schoenenberger on the stand and he told you what he knew.

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Direct.*

Mr. Fraiman: There had been no mention that he went to the F. B. I. headquarters.

The Court: Do not ask one witness what another person knows. That is not an admissible question.

You can ask him what he said, but don't ask him what he knows.

Mr. Fraiman: My purpose was merely to see—

The Court: I don't care what your purpose was. Don't ask him what somebody else knows.

By Mr. Fraiman:

Q. How many agents of the—how many employees of (1402) the F. B. I. did you see when you went to the Bureau headquarters? A. I think that there were four.

Q. Were they all present— A. Possibly three.

Q. Were they all present at one conference that you held? A. They were present in the office, yes. They were present in the office when the matter was discussed.

Q. Could you tell us to the best of your recollection then what was said with respect to this matter by the representatives of the F. B. I.? A. As best I can recall it, we were informed that there were certain information available which may be of interest to us and, if it was, why we were free to use it.

And with that information we proceeded—

Q. Were you informed as to what the information was, Mr. Kanzler? A. Yes. The information was that there was an alien who had illegally entered the United States, and that was the information that was furnished us.

Q. Is that all the information that was furnished you, Mr. Kanzler? A. No. That was the information which would be of inter- (1403) est—of primary interest—to us as Immigration officers.

Q. I asked you if that was all the information furnished you, not what information was of interest to you. A. No.

Excerpts of Hearing on Motion to Suppress.

Lennox Kanzler, for Defendant—Direct.

The further information that the Federal Bureau of Investigation had good reason to believe that the individual involved was engaged in espionage work.

Q. What other information was furnished you? A. That he was located in New York City, and I think that is about the sum and substance of it.

Q. Was it mentioned to you that this man was believed to be a colonel in the Russian Intelligence Service? A. Yes, that is correct.

Q. Was his name mentioned? A. Yes, there were two names mentioned.

Martin Collins and Emil Goldfus.

Q. Did the Federal Bureau of Investigation explain to you why they weren't proceeding against him on espionage charges?

Mr. Maroney: Objection, your Honor.

The Witness: No, they did not explain to me.

By Mr. Fraiman:

Q. At the time that you were at this conference did (1404) the Federal Bureau of Investigation make available to you the report they had prepared concerning this individual? A. I didn't quite understand, sir.

Mr. Fraiman: Will the reporter please read the question?

(Question read.)

(1405) A. They made available to me a report, yes.

Q. Concerning this individual? A. That is correct.

Q. Who gave you that report? A. There was one of the agents in the office of the Federal Bureau of Investigation.

I am trying to recall his name.

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Direct.*

I am not positive, but I think the name was a Mr. Lotrento.

I have to give it to you phonetically. It is Lotrento. I am not sure. It is something similar to that.

Q. Was he the agent in charge of the group when you met? A. No, he was not.

Q. Can you tell us the name, phonetically or otherwise, the name of the agent who was in charge of this group that you met?

The Court: If you know.

A. No, I don't know.

Q. Is there any way you can refresh your recollection, sir, as to his name?

Mr. Maroney: I fail to see the relevancy of the names of all these people.

(1406) The Court: I agree.

A. I could refresh my memory if I could speak with Mr. Notto or Mr. Schoenenberger.

The Court: Never mind who was in charge. That isn't important.

I will assume the responsibility of telling you that.

Q. How many years total have you been with the Immigration and Naturalization Service, Mr. Kanzler? A. A little over 17 years.

Q. During those 17 years, can you tell us approximately how many times you had occasion to go over to the headquarters of the Federal Bureau of Investigation over in Washington to be given the name of the person who was suspected of being an alien illegally in the United States?

Excerpts of Hearing on Motion to Suppress.

Lennox Kanzler, for Defendant—Direct.

Mr. Maroney: I object to that as immaterial, your Honor.

The Court: Sustained.

Q. How long did you spend with the officers of the FBI, Mr. Kanzler? A. Again I will have to estimate, it would be—oh, a couple of hours.

Q. At the time you were in those offices—(1407) strike that.

Was there any decision made as to how you would proceed against this subject?

The Court: Decision by whom, please?

Mr. Fraiman: Either by the FBI or the Immigration Service, your Honor.

The Court: Do you take instructions from the FBI?

The Witness: No, sir, I do not.

The Court: You take instructions from your superior officer?

The Witness: That is correct.

The Court: Did your superior officer issue any instructions to you on this subject?

The Witness: Yes, sir, he did.

The Court: Who was it?

The Witness: Mr. Notto.

The Court: What were the instructions?

The Witness: To draw an order to show cause and a warrant of arrest on the basis of the information that we had on hand.

The Court: Did you do it?

The Witness: Yes, I did.

The Court: Next.

(1408) Q. Were those instructions given to you while you were still in the offices of the FBI?

Excerpts of Hearing on Motion to Suppress.

Lennox Kanzler, for Defendant—Direct.

The Court: Was Mr. Notto with you there?

The Witness: Yes, he was, sir.

The Court: Did he issue the instructions there or elsewhere?

The Witness: No, the instructions were issued there.

Q. Had Mr. Notto in your presence discussed the possible methods of proceeding against this subject with the FBI while you were there?

Mr. Maroney: I object to that as immaterial in the discussions of the possible methods of proceedings.

The Court: I don't know if he is talking about Immigration Department proceedings or other proceedings, and I really don't care whether the subject was discussed or not. It has no bearing on this motion to suppress.

Mr. Maroney: I don't like to continue objecting, your Honor, but it seems to me that we are getting awfully cumulative and not getting to the heart which they claim is the only fact in the case and that is whether or not the Immigration (1409) Officers conducted a search—

The Court: That is what I understand it was for. Please go ahead with another question.

Q. Was there any other discussion at the offices of the FBI that you have not told us about concerning this subject? A. No, I don't recall any.

Q. Were you told to contact anyone in New York connected with the FBI? A. Yes.

The Court: Please withdraw that word. It means nothing.

Mr. Fraiman: I am sorry.

Excerpts of Hearing on Motion to Suppress:

Lennox Kanzler, for Defendant—Direct.

Q. Were you told—

The Court: To communicate with anybody.

Q. In New York connected with the FBI? A. Yes, we were.

Q. Who told you to do that? A. Mr. Notto.

Q. Those instructions were given while you were at the FBI headquarters? A. I believe so.

Q. Whom were you told to communicate with? (1410)
A. With the New York Office of the Federal Bureau of Investigation.

Q. Any particular individual? A. No, I believe it was the officer in charge at New York. I don't know his name.

Q. The officer in charge of the New York office?
A. Whoever was in charge of the New York Office of the Federal Bureau of Investigation, yes.

Q. Did you do so when you got to New York? A. Yes, sir.

Q. Whom did you communicate with when you got to New York? A. The officer who was in charge of the unit that night, as best as I can recall, was a Mr. McAndrews. Again I am not positive. I recall that as being his name.

The Court: Were you present at the arrest and seizure?

The Witness: No, sir, I was not at the time of the arrest. I was shortly thereafter.

The Court: Were you present when there was a search made?

The Witness: Yes, sir.

The Court: Will you please get down to that and ask him what he saw.

(1411) Mr. Fraiman: Yes, your Honor.

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Cross.**Direct examination by Mr. Fraiman (continued):*

Q. Did you participate in the search of the subject's room at the Hotel Latham? A. Yes, sir, I did.

Q. Who else participated in that search? A. Mr. Schoenenberger and Investigators Edward Farley and Edward Boyle of our New York Office.

Q. Could you tell us what you were looking for, sir? A. Yes, we were looking for evidence of identity, alienage and nationality.

Q. You were looking for evidence of identity, alienage and nationality? A. That is correct.

Q. Had you received the subject's permission to search his room? A. I don't recall that he was asked to give such permission.

Q. In fact you didn't receive his permission? A. I don't believe we did.

Q. The search was conducted after the subject (1412) had been placed under arrest, is that correct? A. That is correct.

Mr. Fraiman: Would your Honor bear with me for just one moment, please?

We have no further questions to ask this witness, your Honor.

Cross examination by Mr. Maroney:

Q. Mr. Kanzler, during the course of the search that was conducted in Room 839, at the time of the apprehension of the defendant, did there come a time when there was a conversation concerning the defendant's checking out of the hotel? A. Yes, sir.

Mr. Fraiman: I object to that as being beyond the scope of direct examination, your Honor.

The Court: I don't think any questions were asked on the point.

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Cross.*

Mr. Maroney: They were not, but I think this is a point that the government would like to have in this proceeding.

The Court: All right.

Mr. Fraiman: If your Honor please, it is the (1413) defendants who brought this motion.

The Court: I propose to let him ask the question.

If I should strike all the irrelevant matters that have been produced at this hearing today, there would be very little left, my friend.

Q. Will you tell us the conversation that took place concerning the defendant's checking out of the hotel and between who the conversation took place? A. Yes, sir, while we were packing his personal belongings, it occurred to me—

The Court: Never mind.

Who spoke to whom, please?

A. I spoke to Mr. Abel and asked him what he wanted done about his hotel room.

The Court: What did he say?

The Witness: He then asked me if I would tell him where he was going, where he was being taken. I told Mr. Abel that he was being taken to the Immigration Office at 70 Columbus Avenue, New York.

After he learned that, he said, "Well, I guess I might as well check out of the hotel."

Q. Subsequent to that conversation, or subsequent to that conversation was there another conversation that (1414) took place in the hotel room relating to checking out, to your knowledge? A. Yes, I believe it was Mr. Farley called the desk downstairs to find out the amount of his hotel bill.

Excerpts of Hearing on Motion to Suppress.

Lennox Kanzler, for Defendant—Re-direct.

Upon learning that, he told Mr. Abel what the amount was. Mr. Abel reached into his pocket, drew out some cash and gave it to Mr. Farley, who then left the room to pay the bill.

Mr. Maroney: We have no further questions, your Honor.

Mr. Fraiman: May I have a few questions with respect to re-direct on this subject, your Honor.

The Court: On this subject.

Mr. Fraiman: Yes, your Honor.

Re-direct examination by Mr. Fraiman:

Q. Could you tell us what the practice of the Immigration and Naturalization Service is when someone is arrested in a hotel room?

The Court: That has nothing to do with the payment of the bill, which is the only subject of the cross examination.

Q. You testified that the subject handed over a (1415) sum of money in response to Mr. Farley's request: Is that right? A. Well, no. It was not in response to Mr. Farley's request.

Mr. Farley simply informed him of the amount that the desk told him the hotel bill was and Mr. Abel took the money out of his pocket and gave it to Mr. Farley with which to pay the bill.

Q. Mr. Farley went out and paid the bill? A. Mr. Farley left the room. I do not know whether he went downstairs to pay the bill or someone else did it in his behalf.

Q. Would it refresh your recollection as to what actually occurred if you were told that Mr. Farley testified that he did not leave the room at all, but gave the money to someone else in the room? A. That is quite possible.

*Excerpts of Hearing on Motion to Suppress.**Lennox Kanzler, for Defendant—Re-direct.*

Q. Your memory is not quite clear as to what happened?

Mr. Maroney: Objection.

The Court: If it is deemed important, let it stay.

A. I can't recall Mr. Farley having given that to anyone else in the room, because as I recall, the only (1416) persons in that room were Mr. Schoenenberg, Mr. Farley, Mr. Boyle, Mr. Abel and myself. I am sure that none of us went down with that.

Q. Isn't it a fact that the agents of the FBI were standing right at the door and the door was open, Mr. Kanzler? A. That is correct.

Q. So that Mr. Farley couldn't have been more than two or three feet from the agents of the FBI, isn't that correct?

A. If he was close to the door, that is correct, yes.

Q. Do you know the amount that was paid for the hotel bill? A. No, I do not.

Q. You don't remember that? A. No, sir, I don't think I ever knew it.

Q. Wasn't there a discussion as to the amount in your presence? A. There was a discussion as to the amount being correct, but the—what that amount was, I don't think I ever heard.

Q. Weren't you present when Mr. Farley asked Mr. Abel for the money to pay the hotel bill? A. I was present in the room, sir, yes.

(1417) Q. Wasn't there a conversation in your presence as to the amount? A. There probably was, but I did not hear the amount of the hotel room bill.

Q. You didn't hear it or you don't remember it, sir?

Mr. Maroney: I object, your Honor. I don't think counsel should badger the witness like that.

(1418) The Court: I don't think it is badgering. I think it is just wasting time, that is all.

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

You don't remember the amount of the bill, is that it?

The Witness: That is correct.

The Court: Will you please go on with something else, if you have something else in mind.

Mr. Fraiman: I have nothing further, your Honor.

Mr. Maroney: May this witness be excused, your Honor?

The Court: Yes, sir.

Is there another witness?

Mr. Tompkins: Yes, your Honor.

We would have—we would like to ask the government to produce Mr. Notto tomorrow, if that is possible, and we, of course, do intend to examine several of the FBI agents who were involved in order to bring out the facts of the search and seizure.

The Court: Do you expect to bring out any facts that were not developed?

Do you wish to repeat the same thing?

(1419) Mr. Donovan: Your Honor, if I can make this clear, our entire argument on this point which, incidentally, we regard as the principal legal point which has been developed in the case to date—

The Court: Mr. Donovan, you know what a direct answer is. You are an experienced lawyer.

Do you expect to develop some other witnesses' facts which have not thus far been developed?

Mr. Donovan: Definitely, your Honor, because no one has—

The Court: Is the answer yes?

Mr. Donovan: Yes, your Honor.

Under these circumstances, your Honor, I would appreciate the opportunity to see Mr. Notto tomorrow and to have the FBI witnesses tomorrow morning.

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

The Court: Why don't you state what you would like to develop from them think you can develop and perhaps the other side will stipulate that if they were called they would testify as you think they will.

Mr. Donovan: Your Honor, I will be very pleased to explain that.

(1420) As each one of these men takes the stand, obviously if the man is in the Immigration Service, because of the nature of his responsibility, his mind at the time of going through these actions is going to be on those responsibilities, and so too on the other hand if the man is an FBI man, his mind is going to be on the nature of the FBI interest on the matter, which is espionage,

But the point is that both of these services are only component units of one government department, the Department of Justice.

Now, the entire question here is what was the objective, the true objective of the Department of Justice in conducting this search and seizure. I expect to be able to develop not only in what transpired today, but in what would transpire tomorrow morning that the principal objective, that in the true objective of the Department of Justice in doing what it did was to secure espionage materials relating to a suspected Soviet agent in Room 839 and indeed that was the sole objective of the FBI.

If your Honor, I can establish that, I believe that under the case law and especially the Harris (1421) case, that we do not have the requisite good faith and that the evidence falls.

Furthermore in the event that the Hotel Latham evidence falls because that was the basis of the Fulton Street search and seizure, that falls and, of course, we would make the similar motion there and

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

accordingly on the ground that tainted evidence was presented to the grand jury and we would move to dismiss the indictment.

Your Honor, I have not compelled these requests in any way with the delay of one day of the trial.

On the other hand, I do wish to stress that it is in our judgment of the greatest importance that we be able to develop this search and seizure point as thoroughly as possible.

We will try not to be cumulative, your Honor, and yet, I believe your Honor will find that each witness has added to his predecessor.

The Court: The witnesses you desire to examine are?

Mr. Donovan: The only one more man, your Honor—

(1422) The Court: He has a name, doesn't he?

Mr. Donovan: Mr. Notto, your Honor, only one more man from the Immigration.

The Court: Can you get him?

Mr. Tompkins: We will call immediately, your Honor.

The Court: Who else?

Mr. Donovan: Then there are the FBI agents, your Honor, who, the morning of June 21st actually were the first to make the entry and spend the time with the defendant prior to the arrest.

Mr. Tompkins: He can have one of those here in two minutes, if Mr. Donovan wants to put him on, your Honor.

The Court: Go ahead with him, by all means.

Mr. Tompkins: Who do you want?

Mr. Donovan: We thought we would like to call or finish up the case relating to immigration, your Honor.

The Court: Who is your next witness?

*Excerpts of Hearing on Motion to Suppress.**Colloquy.*

Mr. Donovan: We would like to now examine, in other words—we are seeking to do this in an orderly fashion and we believe we have completed with all immigration witnesses except Mr. Notto.

(1423) The Court: Oh, interrupt it and call your FBI man and get Notto tomorrow.

Can you get Mr. Notto?

Mr. Tompkins: We will call immediately, your Honor.

The Court: All right.

Call your FBI man.

Who is he?

Mr. Donovan: All right, Mr. Blasco.

May it please the Court, while we are waiting, for Mr. Blasco, in substantiation of the point which I was seeking to make, may I direct your Honor's attention to page 17 of the government's brief on this point, where your Honor will find the statement, and I quote:

"The element of good faith on the part of arresting officers has been recognized as a crucial factor in determining the validity of searches and seizures."

The Court: It is one thing for the FBI to say, "We will proceed indirectly" and it is another thing for arresting officers to conduct a search in the hope that they will get something of some kind.

(1424) There is a clear distinction of that in my mind.

Mr. Donovan: Except that there is a decision to be made by the Department of Justice and not the FBI—

The Court: You have got your witness, now.

*Excerpts of Hearing on Motion to Suppress.**Paul J. Blasco, for Defendant—Direct.*

PAUL J. BLASCO, having been first duly sworn, testified as follows:

Direct examination by Mr. Donovan:

Q. Mr. Blasco, would you please state your occupation?
A. I am a Special Agent of the Federal Bureau of Investigation.

Q. Are you attached to a particular office? A. I am assigned to the New York office.

Q. Are you within any particular division of the FBI in that office? A. I am assigned to investigating security matters.

(1425) Q. And how long have you been with the FBI?
A. Approximately ten and one half years.

Q. How long have you been engaged in the investigation of security matters? A. Approximately eight years.

Q. When did you first hear the names Emile Goldfus or Martin Collins? A. Well—

Mr. Maroney: Objected to as immaterial.

The Court: Oh, I will allow it.

Do you know who we are talking about?

The Witness: Yes, sir.

The Court: When did you first hear it?

The Witness: I would say the first part of June 1957.

Q. In early June 1957. And when did you first hear the name Rudolph Abel? A. I first heard the name Rudolph Abel in McAllen, Texas, on or about June 24, 1957.

Q. So that until that date you thought of this individual as Martin Collins or Emile Goldfus? A. That is correct.

Q. When—strike that. Now, at approximately 7 o'clock on the morning (1426) of June 21, 1957, were you at the Hotel Latham outside Room 839? A. At approximately 7 a. m. I was outside of the — of Room 839, Hotel Latham.

*Excerpts of Hearing on Motion to Suppress.**Paul J. Blasco, for Defendant—Direct.*

Q. Now, on whose instructions were you there? A. On my immediate supervisor, John J. O'Brien.

Q. What were your instructions? A. My instructions were to proceed to Room 839 in the company of Special Agent Edward Gamber. We were to knock on the door as close to 7 a. m. as possible in an attempt to interview the occupant of Room 839.

In the interview which was to be held with this individual, if possible, we were to attempt to interview and to solicit his cooperation regarding his background and also about activities of his in the United States.

Q. When were these instructions issued to you? A. These instructions were issued to me on June 20, 1957.

Q. Were such instructions your first knowledge of the defendant being in Room 839 at the Hotel Latham?

Mr. Maroney: Objected to as immaterial.

Mr. Donovan: I think it is very material, (1427) your Honor.

The Court: I will allow it.

A. I learned of the defendant's occupying 839 of the Hotel Latham on June 19, 1957.

Q. Now, shortly after 7 a. m. on that morning, did you knock on the door of Room 839? A. I did not.

Q. Did another FBI agent knock in your presence?

A. At approximately 7:02 a. m. on June 21, 1957, Special Agent Gamber of the Federal Bureau of Investigation knocked on the door of 839.

Q. Was there a response to the knock? A. There was a response, and the individual in the room was heard to say, "Just a minute" or "Just a moment."

Q. Did he open the door? A. He opened the door.

Q. And then what happened when he opened the door? A. As he opened the door, Special Agent Gamber pushed the door open a bit wider and walked into the room and I followed him.

*Excerpts of Hearing on Motion to Suppress.**Paul J. Blasco, for Defendant—Direct.*

Q. Just Special Agent Gamber and you? A. That is correct.

(1428) Q. And then did you close the door behind you?
A. We left the door slightly ajar.

Q. Now, was this the first time that you had ever been in Room 839? A. That is correct.

Q. To your knowledge had any other FBI agent been in Room 839 prior to this entry?

Mr. Maroney: Objection as immaterial.

The Court: He may not state anything that he did not see.

Did you see any other FBI agent in that room prior to this occasion?

The Witness: I did not.

Q. Did you see any FBI agent in the Hotel Latham prior to June 21? A. I did.

Q. When was that? A. At approximately 7 a. m., I saw Special Agent—

The Court: On June 21st?

The Witness: On June 21, 1957, I saw Special Agents Joseph Ph[e]lan, Thomas Green and Claude Curtis.

The Court: Curtis?

The Witness: Curtis.

(1429) Q. When Agent Gamber and you entered the room, how was Collins dressed? A. Collins was in the nude.

Q. For approximately how long did he remain nude?
A. For approximately one minute to two minutes.

Q. Did he request then permission to put on any garment? A. He did not.

Q. Now—

*Excerpts of Hearing on Motion to Suppress.**Paul J. Blasco, for Defendant—Direct.*

The Court: What did he put on?

The Witness: He was instructed to put on a pair of underwear shorts.

Q. Now, at this time the man was not under arrest?

A. That is correct.

Q. But you instructed him to put on the shorts? A. Yes.

Q. What were the first words spoken after Agent Gamber and you entered the room? A. Initially there was an identification of Special Agent Gamber to Collins by Special Agent Gamber producing his credentials to Collins and explaining that he was the Special Agent of the Federal Bureau of Investigation.

(1430) After Agent Gamber had completed doing such, I in turn exhibited my credentials to Collins and also told him that I am a Special Agent of the Federal Bureau of Investigation.

Q. Now, after such identification of yourselves, what were the first words spoken? A. Special Agent Gamber requested Collins to sit on the bed.

Q. And then would you please relate, giving as much detail as you can remember, what transpired after that?

A. At that moment Special Agent Joseph Ph[e]llan entered the room.

Q. Now, approximately what time would you say that was? A. I would say 7:04 a. m., June 21, 1957.

Q. And he simply entered without knocking? A. He admitted himself to the room inasmuch as the door was left ajar.

Q. Did he then identify himself? A. At that moment, Special Agent Ph[e]llan introduced himself to Collins by exhibiting his credentials and upon the return of the credentials by Collins to Ph[e]llan, both Special Agent Gamber and myself again told Collins our (1431) names orally and asked him if he was certain that he knew who we were and with which governmental agency we represented. He said yes.

*Excerpts of Hearing on Motion to Suppress.**Paul J. Blasco, for Defendant—Direct.*

Q. Now, the three of you remained in that room for approximately the next 25 minutes, is that correct? A. Approximately 23 minutes.

Q. And no one else was in the room while the three of you were interviewing Collins? A. No one else entered the room during that period of time.

Q. Now, after these identifications had been complete and Collins told you that he understood what agency you were from, will you then, in all the detail which you can remember, state what any one of the three of you stated to Collins and what Collins stated to any one of the three of you. A. Special Agent Gamber—

The Court: Mr. Witness, I think this is liable to be quite a recital.

Mr. Donovan: Well, it took 23 minutes then.

The Court: I think we better tear ourselves away now and wait until 10:30 tomorrow morning.

10:30 tomorrow morning, Gentlemen.

(1432) Mr. Tompkins: We put in a call for Mr. Notto, your Honor.

The Court: All right.

(1434) The Court: I have just been handed an affidavit made by the defendant sworn to on the 9th day. Has a copy been served on the Government?

Mr. Fraiman: Yes, your Honor.

The Court: You wish this marked filed?

Mr. Fraiman: Yes, your Honor.

Your Honor, yesterday in the course of the proceedings the matter came up as to the amount that was on the bill of the Hotel Latham.

The Government indicated that when they ascertained the amount on that bill they would agree to stipulate what the amount was.

(1435) I wonder if we could ascertain that at this time?

*Excerpts of Hearing on Motion to Suppress.**Paul J. Blasco, for Defendant—Direct.*

The Court: What do you say, gentlemen?

Mr. Maroney: Your Honor, we have made a check and the amount is being verified with the hotel. We will be prepared to stipulate later on.

The Court: This is direct examination of Mr. Blasco continued,

By Mr. Donovan:

Q. Mr. Blasco, when we adjourned yesterday I had asked you the following question and we adjourned before you answered it:

“Now, after these identifications had been complete and Collins told you that he understood what agency you were from, will you then, in all the detail which you can remember, state what any one of the three of you stated to Collins and what Collins stated to any one of the three of you.”

Now, I repeat that question.

A. After the identifications had been made, Special Agent Gamber explained to the occupant of Room 839 the jurisdiction which the Federal Bureau of Investigation has in matters pertaining to the internal security of the (1436) United States.

After this had been—

Q. Pardon me. Would you, as best as you can recollect, tell us what that agent said?

In other words, what was his explanation?

A. Special Agent Gamber explained that the Federal Bureau of Investigation is charged with the responsibility of investigating violations or allegations concerning matters which concern the internal security of the United States.

Q. Now, after he had given this explanation, what next was said? A. Special Agent Gamber then told the occu-

Excerpts of Hearing on Motion to Suppress.

Paul J. Blasco, for Defendant—Direct.

pant of the room that our purpose in wanting to talk to him concerned a matter involving the internal security of the United States.

Q. Did Mr. Collins make any reply to Mr. Gamber?
A. No reply whatsoever.

Q. After this then who next spoke? A. Special Agent Gamber asked the occupant of Room 839 to furnish his name to which he replied, Martin Collins.

Q. Next? A. Special Agent Gamber next asked Collins to furnish his birth date.

(1437) The Court: Is that birth date?

The Witness: Date:

Collins muttered June 15, July 15, and did not indicate the year of his birth.

At this point Collins requested that he be given his false teeth. This was done so by Special Agent Phelan, who was also present in the room at the time, who had gone to the bathroom, as I recall; and brought Collins his false teeth to him.

After Mr. Collins had inserted his false teeth he was again asked by Special Agent Gamber to furnish his birth date.

Collins replied, July 15, 1897.

Collins was next asked why he initially said June 15, July 15, and was asked if he could furnish a reason as to why he had given both dates. This question was met with silence.

Mr. Collins was next asked where he was born, and he replied, New York City.

Special Agent Gamber asked, where do you live, and Collins replied, "Here."

Collins was next asked, how long have you resided at the Hotel Latham?

He gave an indication that he was giving the (1438) question some thought; however, he did not answer the question.

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Collins was also asked where he had lived prior to coming to the Hotel Latham. This question was also met with silence.

Collins was asked to furnish the name of his mother, and he replied Mertha Collins. He was asked to furnish a spelling for the name Mertha, and he spelled it, M-E-R-T-H-A.

Collins was asked to furnish the maiden name of his mother. After some hesitation he replied Rollins.

The Court: Is that Rollins, R-O-L-L-I-N-S?

The Witness: That is correct, your Honor. Rollins.

Collins was asked whether he was employed, and he replied in the negative.

Collins was asked when he was last employed, and he replied some time ago.

Collins was asked to give the question additional thought and tried to give us an answer as to when he was last employed.

Collins failed to answer the question by remaining silent.

Collins was asked to furnish the name of his (1439) father, and this question too was met with the silence.

Collins was asked whether he had any brothers or sisters, and he said, none.

Collins was asked if he had any relatives in the United States, and he replied in the negative.

Collins was asked where he had resided most of his life, and he replied, New York City.

Those questions and answers concerning his background are the best that I can remember.

Collins was told that we would like to have his cooperation in answering these questions, and if he

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failed to do so he would be under arrest before leaving Room 839 of the Hotel Latham that day.

His cooperation was solicited——

The Court: What did he say?

The Witness: He was asked to furnish the answers to the questions asked of him and——

Q. Now, if I may interrupt, Agent Blasco, do you mean by that that he was asked only to answer the questions which you had already asked him, or to answer any questions which you might ask him? A. He was asked at that point to furnish the answers to the questions which had already been asked him.

(1440) Q. Now, you were speaking of soliciting his cooperation and his Honor asked you what did Agent Gamber say? A. He asked for Collins to give the answers to those questions which had been asked of him.

Q. To the best of your recollection, these were the sole questions which were asked of Collins at that time?

A. Yes, sir.

Q. Now, during this interrogation, Mr. Blasco, is it not a fact that you or one of the other F. B. I. agents addressed Mr. Collins as, "Colonel"? A. He was addressed as Colonel. He was also addressed as Mr. Goldfus, some time during our visit to his room.

(1441) Q. Well, now, why did you address him as Colonel?

Mr. Maroney: Objection, your Honor.

The Court: I will allow it.

The Witness: Based on information——

The Court: Just a minute. Did you address him as colonel?

The Witness: No, sir.

The Court: Who did?

The Witness: Special Agent Gamber.

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The Court: Is he to be a witness?

Mr. Donovan: Well, your Honor—

Mr. Maroney: He is available. I don't know.

The Court: This witness may not know why somebody else used the term "Colonel."

You are asking why?

Mr. Donovan: Only if he knows, your Honor. Simply to simplify the presentation. In other words, we can call Agent Gamber, but we are seeking not to pile up cumulative testimony.

Mr. Maroney: We will withdraw the objection.

The Court: All right.

Mr. Maroney: We will withdraw the objection.

By Mr. Donovan:

Q. Yes? (1442) A. He addressed—Special Agent Gamber addressed him as Colonel based on information which he had become aware of in the investigation of Collins.

Q. Had you become aware of such information also?

A. I did not.

Q. To the best of your recollection those questions and those answers, or those failures to answer, comprised the entire discussion while the three of you were along with Collins, is that correct? A. No, sir. Not the entire discussion.

Q. Would you please, then, tell his Honor any other matters which you recall of that discussion? A. During our visit with Collins at Room 839, on at least three or four occasions, he was asked to cooperate by furnishing the answers to the questions asked of him and if not—if he failed to do so—he would be placed under arrest prior to leaving the room;

Q. But— A. During the visit it was also brought to Collins' attention that the Federal Bureau of Investigation had received information indicating that Collins had been involved in espionage.

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Q. Would you please, as best you can recall, give us exactly what was said in that respect? (1443) A. To the best of my recollection the statement which was made by Special Agent Gamber was as follows:

“Colonel, we have received information concerning your involvement in espionage.”

Q. Yes? A. That is the end of the statement.

The Court: Was he asked any questions on that subject?

The Witness: No, sir.

By Mr. Donovan:

Q. Now, Agent Blasco, you have stated several times that you informed this individual, or Agent Gamber did in your presence, that if he failed to cooperate that he would be arrested before he left the room; is that correct? A. That is correct.

Q. Did you in any way indicate what would happen if he would cooperate? A. We did not indicate what would happen if he did not cooperate.

Q. Other than such implication as there may be in the fact that you stated, in effect, that unless he cooperated he would be arrested, is that correct?

Mr. Maroney: I object to the question, your (1444) Honor.

The Court: Sustained.

By Mr. Donovan:

Q. In the event that he did cooperate, did you have any instructions as to what course of action you should take? A. My instructions were to interview Collins, and, in the event that he answered questions being asked of him, either Special Agent Gamber or myself who were participating in the interview were to call our immediate superior at

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the New York Office of the Federal Bureau of Investigation and relate to him the degree of cooperation being exhibited by Collins.

Q. And— A. With respect to further instructions, in the event he failed to cooperate to our satisfaction we were to cause Special Agent Joseph Phelan, who was in the room—Room 839—

The Court: Joseph?

The Witness: Joseph Phelan. P-H-E-L-A-N.

—to summons the I. N. S. investigators who were present in the hotel to Room 839 to effect the arrest warrant of Collins.

The Court: By "I. N. S." you mean the Immigration (1445) Service?

The Witness: Yes, sir. Immigration & Naturalization Service investigators.

By Mr. Donovan:

Q. Now, to the best of your recollection, have you given us everything that was said during the twenty-three minutes which you and the other agents spent with Mr. Collins?

A. To the best of my recollection the things mentioned by me are the highlights of our visit to Room 839.

Q. Mr. Blasco, what, in your judgment, are the highlights?

The Court: The question is: Do you recall anything which took place that you haven't told us about?

Mr. Donovan: That is right.

The Witness: Not as of the moment.

By Mr. Donovan:

Q. Now, before interrogating Mr. Collins, did you warn him of his right not to answer your questions? A. He was given no such warning.

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Q: Did you warn him that anything he said might be used against him as evidence in a criminal proceeding?

A. He was given no such information inasmuch as we were (1446) conducting an interview to—

Q. All I asked— A. —solicit his cooperation.

Q. All I asked—

The Court: I will allow the witness to finish his answer.

Mr. Donovan: Your Honor, all I asked—

The Court: I will allow the witness to finish his answer.

By Mr. Donovan:

Q. Would you please finish your answer, Mr. Blasco?

A. We did not give him any such instruction inasmuch as we were interviewing him to solicit his cooperation.

Q. However, as a law enforcement officer, did you not have standing instructions from the F. B. I. as to what warnings are to be given a man when apprehended?

Mr. Maroney: I object to the question, your Honor.

This man was not apprehended by the F. B. I.

The Court: I think the witness has answered your question. Now, if you wish to demonstrate that he didn't exercise a function which he might have functioned, isn't that purely argumentative?

(1447) Mr. Donovan: I don't believe so, your Honor. I am just trying to bring out the facts. As to what I can argue from those facts at a subsequent date, that is something else.

The Court: He has told you no warning was given. How can you ask that question?

Mr. Donovan: I wanted to ask him whether he told this suspected alien that he was entitled to a lawyer.

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The Court: Why don't you ask him that?

Mr. Donovan: I am, your Honor.

The Court: Why don't you ask him that?

Mr. Donovan: I am asking that question now, your Honor.

The Witness: Will you repeat your question, please?

The Court: Did you tell him that he was entitled to consult a lawyer?

The Witness: He was not told that he had a right to consult a lawyer.

Mr. Donovan: Now, your Honor, did I understand you to rule that I cannot ask him as to whether, as a law enforcement officer, he doesn't have standing instructions from the F. B. I.?

(1448) The Court: No, I didn't. I just tried to point out that it won't help us very much. But if you want to press it, go ahead, of course.

By Mr. Donovan:

Q. Mr. Blasco, when the three of you came into the room, displayed your badges, instructed the man to put on a pair of undershorts, told him that unless he would cooperate he would be arrested and the other facts which you have stated to us, would you not believe that the subject would regard this, while not an arrest, as an apprehension?

Mr. Maroney: I object to the question, your Honor, as argumentative.

The Court: You are asking the witness for his mental operation. If you wish to press it, I will not sustain the objection.

It is just argumentative, Mr. Donovan, that's all.

Mr. Donovan: Well, your Honor, it is simply a question that I wished to ask preliminarily.

The Court: Go ahead and ask him. Go ahead.

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The Witness: I would say not on the basis that if an individual is to be arrested he is immediately advised of such a fact; and that is the manner in (1449) which the Federal Bureau of Investigation operates, if they are going to arrest an individual, immediately upon identification the individual is advised of such, he is being placed under arrest.

By Mr. Donovan:

Q. But you had—you had informed this man that unless he cooperated he would be arrested; isn't that correct? A. That is correct.

Q. Now, under such circumstances, as I understand your testimony, you are saying that you do not have instructions from the F. B. I. to give these warnings I have referred to; is that correct? A. Will you repeat that, please?

The Court: Read the question.

(Question read.)

The Witness: That is not correct.

By Mr. Donovan:

Q. Then, kindly correct me. A. Where an individual is to be arrested by an agent of the Federal Bureau of Investigation, all agents are instructed that the individual to be arrested is immediately advised of his rights upon arrest.

Q. In other words, you are drawing a distinction in (1450) this case between the fact that if an arrest were to be made it would be made by the Immigration officer; is that correct? A. That is correct.

Q. And that under such circumstances, you did not believe that any such warnings should be given, pursuant to your instructions? A. That is correct.

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Q. Now, were you present when the Immigration officers at the end of this period did serve the warrant of arrest and the show cause order on Collins? A. I was present in the room at the time the Immigration & Naturalization Service officers or investigators entered the room; after which Investigator Edward Boyle served Collins—after establishing his identity as Martin Collins—served him with an alien arrest warrant and read to him portions of the order to show cause for a deportation hearing.

Q. Now, at that time do you recall either any F. B. I. agent or any Immigration officer giving to Collins the warnings I have related to you? A. I recall Investigator Boyle advising Collins that he had a right to counsel.

Q. That he had a right to counsel? (1451) A. That is correct.

Q. Do you recall his being advised that he had a right to say nothing? A. I don't recall hearing any such words.

Q. Do you recall his being advised that anything which he said might be used against him as evidence in the proceeding? A. I do not recall any such words being given to him.

Q. Now, at the conclusion of the 23 minutes, who called in the Immigration officers?

Mr. Maroney: Objection, Your Honor. It has already been testified to, I believe. I think he said Special Agent Phelan.

The Court: I don't think this witness said who actually gave the signal.

Mr. Maroney: I thought he did earlier. He said Special Agent Phelan went out and summoned the Immigration Officers. I may be wrong.

I have no objection to him doing it again. I just think that we are repeating.

The Witness: At one point in the interview, Special Agent Gamber and myself had conferred in

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whispers, at which time it was decided between us that Special Agent Phelan should leave the room and (1452) call the Immigration and Naturalization Service investigators to Room 839 to effect the arrest of Collins.

After it was agreed between us, we asked Joseph Phelan to carry out that instruction.

By Mr. Donovan:

Q. And then what happened? A. At approximately 7:25, Immigration & Naturalization Service Investigators Edward Farley and Edward Boyle entered the room—Room 839 in the Hotel Latham—and Investigator Boyle asked the occupant of the room to furnish his name.

The Court: Furnish his?

The Witness: To furnish his name.

When the defendant gave the name Martin Collins, Immigration & Naturalization Service Investigator Boyle served the arrest and read portions of the order to show cause to him and asked Collins to sign it, which Collins did.

With the entrance of the Immigration & Naturalization Service investigators, I had moved to the rear portion of the room and away from the bed, the night stand, with my back to the bathroom door. Special Agent Gamber had moved to a position very (1453) near the door leading into the hotel room.

Q. How long did you remain in those positions? A. I remained in the room for approximately twelve to fifteen minutes.

Q. Now, this is subsequent to the entrance into the room of the Immigration officers, is that correct? A. That is correct.

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Q. Now, the events you have just described—that is, the entry into the room of the Immigration officers, the service of these papers and so on, as I understand your testimony, took place in accordance with the arrangements that had been mutually agreed upon between your two Services as to what should be done in the event that the man refused to cooperate; is that correct?

Mr. Maroney: I object, your Honor. I do not recall any such testimony from this witness.

The Court: May I hear the question?

(Question read.)

The Court: I will allow it.

Isn't that in effect what you have told us?

The Witness: Yes.

By Mr. Donovan:

Q. Now, after the service of these papers, am I correct in understanding that the Immigration officers commenced to search the room? Is that correct? A. That is correct.

Q. And, as I understand your testimony, for twelve minutes or thirteen minutes while this went on, it was being done in your presence; is that correct? A. That is correct.

Q. Now, during this period while this search was being carried on, what did you do? A. I stood in the room with my back to the bathroom door.

Q. Were you present, Mr. Blasco, when a discussion was had relative to Collins' checking out of the hotel? A. I recall that while I was present in the room one of the Immigration & Naturalization service investigators asked Collins if there was any rent due on his room.

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I recall that Mr. Collins said that he last paid the bill the previous Saturday, and that he would owe rent—room rent—from that date.

And I recall that Mr. Collins said his—the amount due would be \$21.

Thereafter the Immigration & Naturalization Service investigator who directed—initially directed—that question to Collins asked him to take or separate that amount of money from the currency which was laying on his—on the hotel bed.

(1455) Q. Now, with respect to any of the objects searched in that room, did you participate in any of that search? A. I did not participate in the search in any fashion whatsoever.

Q. Did you, for example, inspect any of the objects searched? A. I did not inspect any of the objects searched.

Q. You did see the objects that were being searched, however? A. I did see, among the things I saw at the room were clothing, paint supplies, a camera, a radio, and Mr. Collins' wallet while it was being searched by the Immigration & Naturalization Service investigators.

Q. Now, was your interest in these objects to see whether they related to espionage?

Mr. Maroney: Objection, your Honor.

The Court: It doesn't appear that he had any interest.

He said that he observed the search. He inspected no articles.

Why ask him for his mental operation?

Mr. Donovan: I didn't mean it to call for his mental operation.

The Court: You asked him what his interest (1456) was. Isn't that a mental operation?

Mr. Donovan: Your Honor, the man went there under instructions.

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The Court: All right. Let's not waste too much time on it arguing.

I think you are asking him for his mental operation, and I don't think that is admissible.

Next question.

Q. In your presence, Mr. Blasco, did any of the other F. B. I. agents inspect any of these objects? A. Not that anything that I saw—I did not see where any other special agent of the Federal Bureau of Investigation had inspected any of the personal effects of Mr. Collins.

The Court: Are you distinguishing between personal effects and other objects?

The Witness: By personal effects I mean everything that I saw in the room.

Q. But as I understand your—the testimony, you are not saying to your knowledge, no F. B. I. agent did search any of the objects? Is that correct?

Mr. Maroney: I object, your Honor.

The Court: I will sustain it.

He told you that he didn't see anybody do a (1457) certain thing.

Of course, he isn't saying that such a thing could not have happened.

He is here to tell you what he saw.

Q. Now, Mr. Blasco, you have testified as to the jurisdiction of the F. B. I. with respect to matters of the internal security of the United States.

The Court: He didn't use the word jurisdiction. He told you what their duty was.

Mr. Donovan: I believe, your Honor, that he did use the word jurisdiction.

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The Court: If he did, I think that it is an improper use of the word.

He told you what the function of the F. B. I. is.

Q. Now, could you then, Mr. Blasco, tell me whether the F. B. I. exercises any function with respect to aliens simply because they are aliens?

Mr. Maroney: Objected to as immaterial,

Mr. Donovan: Oh, your Honor.

Mr. Maroney: It seems to me what is important here is what was done.

The Court: That is what I have to inquire into. What was done in this case.

(1458) Now, whether this was exception or not, doesn't help one bit.

We have got to make a little progress with this matter.

Mr. Donovan: Your Honor, he could make progress—

The Court: He could make a speech if I permitted him to, but I am not going to.

Whether this was usual or unusual—doesn't help us.

Mr. Donovan: That isn't my point.

In other words, so far as I know, as a matter of law and he must know as a law enforcement officer, the F. B. I. has no jurisdiction with respect to aliens simply because they are aliens.

The Court: Will you ask another question, please?

Mr. Donovan: All right.

The Court: You may ask him if he has ever served in a similar capacity in another case.

Mr. Donovan: I didn't have that in mind, your Honor.

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The Court: I thought you didn't.

Mr. Donovan: No.

The Court: Go ahead.

(1459) Q. You have stated, Mr. Blasco, in effect that the F. B. I. does exercise functions in the field of espionage, is that correct? A. That is correct.

Q. And is it not a fact that this function of internal security also embraces counter-espionage?

Mr. Maroney: Objected to as immaterial, your Honor.

The Court: I will allow it.

I don't know what the purpose of it is. He is simply asking about the techniques employed by the F. B. I.

Mr. Donovan: Simply asking whether or not it is not a fact that the F. B. I. exercises functions with respect to counter-espionage.

The Witness: They do.

The Court: Is the answer yes?

The Witness: Yes.

Mr. Donovan: That is all at this time, your Honor.

The Court: Well, what do you mean, at this time? Do you wish this witness to testify as to anything else?

Mr. Donovan: What I meant was that we might (1460) have a few questions after Mr. Maroney gets through.

Cross examination by Mr. Maroney:

Q. Mr. Blasco, you testified that during your stay in the room or your visit to Room 839, on the morning of June 21, 1957, that you saw a radio in the room.

Is that correct? A. That is correct.

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Q. Would you describe the radio? A. I can describe it as being a Hallierafter, gray in color.

Q. Do you know whether or not—

The Court: Will you spell that for me?

The Witness: H-A-L-L-I-C-R-A-F-T-E-R, gray in color.

Q. Do you know whether or not it was a short-wave radio? A. I do not know.

Q. Now, did it have an aerial of any kind? A. Yes.

Q. Will you describe that, please? A. The radio was on a night stand alongside of Mr. Collins' bed and there was an aerial attached to it.

The aerial was green in color.

(1461) The aerial ran from the radio up the back of the wall of the room, was affixed to the molding at the ceiling of the room, was strung across the hotel room under the top of the bathroom door frame, through the bathroom, and out the bathroom window.

Q. The aerial, I take it, was wire? A. A wire, green in color, with a green covering.

Mr. Maroney: No further questions, your Honor.

Mr. Donovan: Is that all, your Honor?

The Court: I understand that is all he has.

Re-direct examination by Mr. Donovan:

Q. Mr. Blasco, with respect to this radio, which you saw, to the best of your knowledge, is it not a fact that such a radio, Hallierafter radios are readily available for purchase in any radio store in the city of New York? A. I do not know it as a matter of fact. I would assume that they are commercially available to the general public for sale.

Mr. Donovan: Will not the Government agree that such is the fact?

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Mr. Maroney: I think that that is an assumption which should not be permitted in the record.

(1462) I think it is something which might be a matter of defense in the event this is offered at the trial.

Mr. Donovan: He has brought out the fact that this radio was there. He has shown nothing special about the radio.

The Court: Does he have to?

Mr. Donovan: I believe so, to make it pertinent to this.

The Court: Why?

Mr. Donovan: Why is it important that he saw a toothbrush in the room?

The Court: I don't think that I am required to inquire into the radio model. All the testimony is that such a device was there. Whether it is freely traded in or not doesn't help.

Mr. Donovan: In that event, I respectfully move that the questions and the answers of the witness be stricken from the record as irrelevant.

Mr. Maroney: And that the direct examination be stricken also?

The Court: Denied.

Mr. Donovan: That would be the only questions we would have, your Honor.

Your Honor, may we approach the bench?

(1463) The Court: Yes.

(Side-bar discussion.)

*Excerpts of Hearing on Motion to Suppress.**Mario T. Noto, for Defendant—Direct.*

MARIO T. NOTO, called as a witness, having been first duly sworn, testified as follows:

Direct examination by Mr. Fraiman:

Q. What is your occupation, Mr. Noto? A. Deputy Assistant Commissioner for Special Investigations, United States Immigration & Naturalization Service.

Q. Where do you perform your duties, sir? A. Washington, D. C.

Q. How-long have you been employed with the Immigration & Naturalization Service? A. Fifteen and a half years.

Q. Will you tell the Court briefly what your duties are in your present capacity, sir? A. My duties are to supervise that area of special investigations for the Immigration Service which consist of subversive activities, activities relating to criminals, (1464) narcotics, immoral classes of people who may be subject to proceedings falling in the jurisdiction of the Immigration Service.

Q. Who is your immediate superior in the Immigration & Naturalization Service, sir? A. Mr. Raymond F. Farrell.

Q. What is his position? A. Assistant Commissioner for the Investigations Division.

Q. Were you on duty with the Immigration & Naturalization Service on June 20th, 1957, sir? A. I was.

Q. In the course of that day did you receive information from anyone concerning the presence in this country of an alien who was suspected of committing espionage? A. Is that June 20th?

Q. June 20th. A. Yes.

Q. Was that the first time that such information had come to your attention? A. No, sir.

Q. Would you tell the Court when the first time such information did come to your attention, sir? A. Approximately one week prior to June 20th.

(1465) Q. It would be approximately June 13? A. Or thereabouts.

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Q. In what way was that brought to your attention?

A. Orally.

Q. By whom? A. Representatives of the Federal Bureau of Investigation.

Q. Do you know the individual who gave you this information? A. Yes.

Q. What is his name? A. Mr. Papich.

Q. He is the liaison officer between Immigration and the Federal Bureau of Investigation? A. That is correct.

Q. He is associated with the F. B. I.? A. Correct.

Q. Where did the conversation take place, sir? A. In my office.

Q. Who else was present? A. I don't believe anyone else was present.

Q. And it was in this conversation that you first heard of the existence of this alien suspected of espionage? (1466)

A. That is correct, referring to Mr. Abel.

Q. Referring to Mr. Abel. A. Yes.

Q. Will you tell us to the best of your recollection what was said by Mr. Papich to you in this conversation? A. Mr. Papich told me substantially that Mr. Abel was, according to information, that the F. B. I. had, in the United States illegally and that they were interested in him because of his espionage activities. I asked him for some details which he gave me with respect to Mr. Abel.

Q. Will you tell us the details that he gave you, sir, to the best of your recollection? A. He said that they had information which had indicated that Mr. Abel had come into the United States illegally.

I believe he said he came through Canada, that he was known to be using fraudulent documents in the United States which professed him to be a citizen, whereas in fact he was an alien. That is as much as I can recall.

Q. Did Mr. Papich give you any information concerning why the F. B. I. was interested in this man? (1467) A. Yes, he did.

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Q. Will you tell us what that information was in as much detail as you can? A. He told me that they had strong indications that Mr. Abel was engaged in espionage activities.

I didn't ask him any questions with respect to that, because my interest from a jurisdictional viewpoint is confined to the illegal status which he had in the United States.

Q. He gave you no further information other than that he was engaged in espionage activities? A. Other than the information relating to his alienage and illegal status in the United States.

Q. Did you ask Mr. Papich why the F. B. I. didn't arrest this man?

Mr. Maroney: Objection, your Honor.

The Court: Sustained.

Q. Did Mr. Papich indicate what if anything he wished you to do about this matter? A. No.

The Court: What is the answer?

The Witness: No, sir.

Q. Is that the full extent of your conversation with Mr. Papich? (1468) A. I think my recollection is, I asked him for some additional details with respect to the illegal status, or any details concerning Mr. Abel's entry into the United States and he advised me that he would try to get it for me.

Q. At that time he gave you no further details? A. No, sir.

Q. Did they tell you where Mr. Abel could be located? A. I don't recall if he told me at that particular time.

He may have told me a little later, but not the first time that we discussed it.

Q. Did he tell you what his name was? Did he tell you that his name was Abel? Did he refer to him as Abel? A.

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My recollection is that various names were used, Abel, Gold-fus, Collins; but all identifying the same individual.

Q. On June 13th, he referred to this man as Abel? A. On or about June 13th.

Q. Did he tell you whether he had any rank?

The Court: Had any what?

Mr. Fraiman: Rank.

Q. Did he tell you whether he had any rank in the Soviet espionage system or anything to that effect? (1469) A. I don't recall that.

Q. How long did this conversation take place, sir?

Mr. Maroney: I object to the question as immaterial, your Honor.

The Court: Oh, I will allow it.

Do you recall how long?

The Witness: Approximately a half-hour.

Q. Approximately how long? A. Approximately a half-hour.

Q. Half-hour? A. Yes, sir.

Q. After you left Mr. Papich, did you immediately make arrangements to arrest this individual? A. No, sir.

Q. What did you do?

Mr. Maroney: Objected to as immaterial, your Honor.

Mr. Fraiman: I think that it is highly material, your Honor.

Mr. Maroney: He might have done something in connection with another case, as to what he did thereafter.

The Court: I think the question refers to (1470) this matter.

What did you do next with respect to this individual?

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The Witness: My recollection is that I asked for a search of immigration records, for any record relating to those names.

Q. When did you do that? A. Shortly after. It may have been within the next hour or so.

Q. Before you left Mr. Papich, did you make any arrangements to confer further with the Federal Bureau of Investigation on this matter? A. No arrangements were made. I asked Mr. Papich to furnish me other details which I asked him for which I was interested in.

Q. And he agreed to do that? A. Yes, sir.

Q. Was it understood that you would take no action until you received these further details?

Mr. Maroney: Objection.

The Court: I don't like that kind of a question.

Mr. Fraiman: I will rephrase it, your Honor.

(1471) Q. Did you indicate in any way to Mr. Papich that you would take no action until you had received further details from him? A. No, sir, other than by our conversation that I asked him to furnish me with additional data.

The Court: Excuse me.

At that time did you know where this person could be found?

Did you have his address?

The Witness: No, sir.

The Court: This is June 13th?

The Witness: No, sir.

The Court: Do you know when you got the address?

The Witness: I received that information some time between on or about June 13th and June 20th.

The Court: During that week, is that it?

The Witness: Yes, sir.

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By Mr. Fraiman:

Q. After you had your conversation with Mr. Papich, did you discuss this matter with your superiors in the Immigration & Naturalization Service? A. Yes, sir.

Q. With whom did you discuss the matter? (1472) A. I think I discussed it very briefly with Mr. Farrell and I think I also discussed it with the Commissioner.

Q. Mr. Swing? A. General Swing.

Q. He is the head of the entire Immigration & Naturalization Service? A. That is right.

Q. Would you tell us your discussion with Mr. Swing? When did that take place, first? A. Well, my conversations with General Swing took place some time prior to June 20th.

Q. Some time? A. Some time prior to June 20, but not immediately after my conversations with Mr. Papich.

When I had received additional information from Mr. Papich, subsequent to our first conversation, when I was of the opinion that we had a case—an immigration case—on Mr. Abel for illegal entry, I discussed the matter briefly with General Swing to advise him of the fact that I proposed to place Mr. Abel under deportation proceedings, and I also acquainted him with the—slightly—with the background—that is, the matters relating to espionage activities.

Q. When you spoke to General Swing did the General (1473) in any way indicate to you that he was already aware of this matter? A. No, sir.

Q. Did he indicate to you that he was not aware of this matter? A. Yes, sir.

Q. So that you brought it to his attention for the first time? A. That is correct.

Q. Will you tell us what the additional information was that you obtained from Mr. Papich? A. Again, to the best of my recollection, the information was, the various names—that is, the complete names or aliases that had been

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used, the fact that Mr. Abel had used a birth record under a name which I do not recall at the moment and that he had entered from Canada and that he had engaged in espionage activities; and I think at that time I was advised that he held some kind of rank in the Soviet espionage apparatus, and that the information concerning his true identity had been established, that he was not in fact Emil Goldfus and that he was known as Rudolf Abel, and that he had admitted to various persons the fact that he had entered the United States illegally.

(1474) Q. When was this information, this additional information furnished you, Mr. Noto? A. It could have been June 19 or June 18.

Q. Were you told at that time— A. Or possibly the morning of June 20, I am not sure.

Q. Were you told at that time where the defendant could be located? A. Yes.

Q. Did you confer, when you received that information, with anyone else with the F. B. I.?

The Court: Just a minute. I missed the question.

(Question read.)

The Witness: Yes, I think that I mentioned it to Mr. Farrell.

By Mr. Fraiman:

Q. I said at the F. B. I., sir. A. I didn't confer with them. I spoke to them.

Q. Whom did you speak to, sir? A. The name is hazy, but I think it is a Mr. Don Moore.

Q. Don Moore? A. And a Mr. Latranto.

Q. Do you know what Mr. Moore's position is at the F. B. I.? (1475) A. Not specifically other than to know that he is a supervisor.

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The Court: The second name, please?

The Witness: Moore. M-O-O-R-E, and Latrano, or Latranto, L-A-T-R-A-N-T-O.

By Mr. Fraiman:

Q. Was this a telephone conversation that you had with these individuals or did you see them in person? A. Both on the telephone and in person.

Q. When did these conversations take place? A. June 20th and possibly on the 19th.

Q. Where did they take place? A. Mr. Moore's office.

Q. At the F. B. I. headquarters? A. That is right.

Q. Who was present when you had this conversation or conversations?

Mr. Maroney: Objection, your Honor. I see no reason to bring out all the specific identities of everybody here.

The Court: Let's gratify counsel's curiosity.

Who was present?

I don't think that it makes the slightest part—(1475) icle of difference, but who was present?

The Witness: Mr. Moore, Mr. Latranto, and I think that Mr. Schoenenberger from my office may have been present, during part of it.

By Mr. Fraiman:

Q. Who arranged for you to go to the Federal Bureau of Investigation?

The Court: I will sustain the objection. I don't care who arranged it.

They had a conference. Now, go ahead.

By Mr. Fraiman:

Q. What was said with respect to this matter in your conversation with Mr. Moore, sir, and Mr. Latranto? A.

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I do think it was of the nature of a reconfirmation of what I had been told by Mr. Papich.

Q. And you received this information from Mr. Papich some time prior to your conversation with Mr. Moore; is that right? A. Yes.

Q. Did you indicate at that time that you would not proceed against this man until you had conferred further with the F. B. I.? A. No, sir.

Mr. Maroney: Objection, your Honor.

(1477) The Court: Sustained.

I don't know what you mean by "indicate." Ask him what he said.

By Mr. Fraiman:

Q. Did you say anything to Mr. Papich to the effect you would not proceed further until you had spoken further with the F. B. I.?

The Court: Now, have you dropped the meeting in Moore's office?

Mr. Fraiman: No, your Honor.

The Court: That is where you were last?

Mr. Fraiman: I know that, your Honor.

The Court: Now you are asking him questions about what took place at that meeting, are you?

Mr. Fraiman: This question did not relate to that meeting.

The Court: Yes, but I am asking you to do one thing at a time.

Mr. Fraiman: I am sorry.

The Court: And exhaust one thing before you take up another.

Have you told us everything that took place in the meeting with Mr. Moore, sir?

The Witness: Yes, sir.

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(1478) By Mr. Fraiman:

Q. Did you say at that meeting when you intended to arrest this man? A. I don't recall whether I told them then.

Q. Did the F. B. I. at this meeting tell you when to arrest him?

Mr. Maroney: Objection.

The Witness: No, sir.

By Mr. Fraiman:

Q. Was any discussion had concerning when this man would be arrested at that meeting? A. In a general way.

Q. Will you tell us what it was? A. My recollection is that at the meeting and my discussions with Mr. Moore and Mr. Latranto, I told them that I would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes, and I think that shortly after the meeting I called Mr. Moore and told him I—it's possible that I could have mentioned it to him before I left him.

That I had determined that I had enough evidence upon which I was going to order that Mr. Abel would be arrested.

Q. And charged with what? (1479) A. Charged with having failed to notify the Attorney General of his address in the United States as required by the Immigration & Nationality Act which makes it a deportable offense.

Q. Makes it a crime to do that, does it not?

Mr. Maroney: Objection, your Honor.

The Court: Are you trying to prove law out of the mouth of this witness, or are you trying to prove what he decided to do?

Mr. Fraiman: I am trying to ask him what he decided to do, your Honor.

The Court: He has told you that he decided to apprehend him.

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Mr. Fraiman: Charging him with a specific offense.

The Court: Yes.

By Mr. Fraiman:

Q. Isn't it necessary, Mr. Noto, to charge someone with that offense you must obtain a warrant from the United States Commissioner? A. Not for—

Mr. Maroney: Objection. It seems to me that calls for a legal conclusion.

The Court: It certainly does.

(1480) Mr. Fraiman: I think, your Honor, this witness is capable of answering such a question.

The Court: It isn't a question of whether he is capable of answering such a question. It is a question of whether it is germane to the matter before the Court.

Mr. Fraiman: I believe it is, your Honor.

The Court: I don't. Go ahead.

By Mr. Fraiman:

Q. Did you say, when you told Mr. Moore that you had enough evidence to arrest this man and that you were going to do so, did you say when you were going to arrest him? A. My recollection is that I told him that we would pick him up as soon as possible, but I don't recall whether I told him a specific time, but I indicated—I told him that I was going to act on it quickly.

Q. Did he ask you to let him know when you were going to act? A. I don't recall whether he asked.

Q. Did someone ask? A. It could very well have been, for the reason that on matters of this type it is just a routine operation to coordinate these matters with the F. B. I. without asking (1481) one another.

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Q. Are you saying that this was a routine operation,
sir?

Mr. Maroney: I object to the question as being argumentative, your Honor.

The Court: I will allow it.

The Witness: The arrest of an alien—

By Mr. Fraiman:

Q. Please answer the question, Mr. Noto.

Mr. Maroney: I think the witness should be allowed to answer the question.

The Witness: May I have the question?

Mr. Maroney: And not be interrupted.

Mr. Fraiman: It calls for a yes or no answer.

The Court: Are you telling me how to conduct the hearing?

Mr. Fraiman: No, I am not, your Honor.

The Court: I think that is good judgment.

Now, will you answer the question, please?

The Witness: The arrest of an alien in and of itself is a routine matter, but the arrest of an alien where there is some subversive background or activity is a matter of mutual interest, and in those cases, there is close coordination between (1482) the F. B. I. and the Immigration Service.

Q. And this was not a routine matter?

Mr. Maroney: Objected to.

The Court: I think that the witness has explained his understanding of this matter, and how it should be handled, and I don't think it is necessary for you to argue with him.

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By Mr. Fraiman:

Q. Did you at any time tell the F. B. I., either at that meeting or any time, when you intended to arrest this man? A. Yes, I did.

Q. Well, when, sir? A. My recollection is on June 20th.

Q. Isn't that when this meeting took place?

The Court: Are you willing to let the witness answer the question?

Mr. Fraiman: I thought that he had finished, your Honor.

The Court: Your recollection is?

The Witness: My recollection is on June 20th, and it could have been either at my—with my discussions with Mr. Moore or shortly thereafter.

I cannot recall of the exact time when I told (1483) them that I intended to have Mr. Abel arrested.

Q. Before you told them that, did you confer with General Swing? A. Yes, I had.

Q. Is it routine for you to confer with General Swing in these matters?

Mr. Maroney: Objected to. I don't see that it has any relevancy, your Honor, whether it was routine or not.

The Court: Neither do I. Neither do I.

Mr. Fraiman: The witness indicated that this was a routine matter.

Mr. Maroney: The question is what did he do at this time.

The Court: Your testimony is that you conferred with General Swing. Do you recall whether it was after your interview with Mr. Moore or before your interview with Mr. Moore?

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The Witness: Before my interview with Mr. Moore.

The Court: You didn't confer with him after?

The Witness: No, sir.

By Mr. Fraiman:

Q. Had the E. B. I. asked you at the meeting with (1484) Mr. Moore to let them know the date on which you intended to arrest this man? A. I don't recall whether they did or not. I do not.

Q. What did you do with respect to this matter after you had this conversation with Mr. Moore at Mr. Moore's office? A. I told Mr. Schoenenberger from my office to go to New York and communicate with the district director of the New York office and to—

Q. Is that of the Immigration or the F. B. I.? A. The United States Immigration.

And to convey to him all of the information which we had which could not be communicated on the telephone and to—after apprising Mr. Murff of the information—that it was my belief that we should move and apprehend Mr. Abel as quickly as possible.

Q. Did you also instruct him to confer with the F. B. I.?

A. I did not instruct him to confer with the F. B. I., but I told him that in the interest of coordination, in view of Mr. Abel's background, that when he arrived in New York after his conversations with the District Director, that I would appreciate it if he would get in touch with the New York office of the F. B. I.

Q. Then you did instruct him to confer with the (1485) F. B. I.?

Mr. Maroney: Objection, your Honor. I think the witness stated what he told him and what his instructions were.

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The Court: Yes, but counsel doesn't like the answer.

Go on, ask another question.

By Mr. Fraiman:

Q. Did you tell him whom to contact at the F. B. I.?

The Court: Did he— He means, did you tell him whom to communicate with at the F. B. I.

By Mr. Fraiman:

Q. Whom to communicate with?

The Court: Whom to speak to.

The Witness: I believe that I told Mr. Schoenenberger to communicate with the Special Agent in charge of the New York office of the F. B. I.

By Mr. Fraiman:

Q. Did the F. B. I. in Washington request that that procedure be followed? A. No, sir.

Q. Was there any discussion? A. Not to my recollection.

Q. Was there any discussion about following that (1486) procedure while you were in Washington discussing this matter with the F. B. I.? A. It is quite possible that in the course of conversation with Mr. Moore, that I may have said to him that when Mr. Schoenenberger is in New York, after he has discussed the matter with the District Director of the Immigration Service, I will have him get in touch with the special agent in charge of your office.

(1487) Q. Wasn't there a discussion in Washington, sir, about the F. B. I. interviewing this man first before the Immigration people made their arrest? A. I don't recall that.

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Q. Weren't you aware that that was the procedure that was to be followed? A. To the best of my recollection, my instructions were to Mr. Schoenenberger that after he had conferred with Mr. Murff, a warrant of arrest and an order to show cause were to be issued, and at the earliest hour possible the next morning Mr. Abel was to be arrested on the Immigration warrant and order.

Q. My question, sir, was whether you were aware of the fact that the F. B. I. were to interview this man prior to his being arrested by the Immigration Service? A. I don't recall that. I don't recall specifically that the F. B. I. was to talk to him before we arrested him.

Q. You cannot say, then, that no such arrangement was made?

Mr. Maroney: I submit the question has been answered, your Honor.

The Court: I think it has been.

Have you told us all you recall on the subject?

The Witness: Yes, sir.

By Mr. Fraiman:

Q. At some time between June 13th and June 20th were you furnished with a report from the Federal Bureau of Investigation? A. Yes, sir.

Q. When was that? A. June 20th.

Q. On June 20th? A. That's right.

Q. Who gave you that report? A. I don't recall whether it was Mr. Latranto or Mr. Papich. Mr. Latranto or Mr. Papich. I don't recall which one did, but one of them did.

Q. Did anybody tell you at that time who had written that report? A. No, sir.

Q. Could you tell from an examination of the report who had prepared it? A. No, sir, except that it was a report of the Federal Bureau of Investigation.

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—Q. When Mr. Papich gave you some information concerning Abel, you said that you checked your Immigration files for that name or several other names that you had? (1489) A. That's right.

Q. Did he give you the name of any other individual at the same time other than this—referring other than to this person?

Mr. Maroney: I object, your Honor. I think I fail to see the materiality of that.

The Court: I don't understand it but there are a lot of things I don't understand about this.

Did he give you any other name?

The Witness: Well, the names were mentioned. I don't follow by giving me the name—I don't understand the question.

The Court: I think what he is getting at is this: Was there more than one individual concerning whom you caused a search to be made?

The Witness: No, sir. Just one individual.

By Mr. Fraiman:

Q. That was the man whom you knew as Rudolf Abel or Martin Collins or Emil Goldfus? A. Correct.

Q. No other individual's name? A. That's right.

Q. Were you subsequently given the name of any other individual by the—

(1490) Mr. Tompkins: Objection.

The Court: I will sustain the objection.

By Mr. Fraiman:

Q. After you had this conversation with Mr. Moore in which Mr. Schoenenberger participated, what did you do, sir? A. I left—

Q. With respect to this matter? A. Oh. Nothing further except to—

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The Court: Anything that you haven't already testified to?

The Witness: Well, after that I followed the case closely in that I had New York notify me as to the arrest.

In other words, I wanted a report as to what had happened.

By Mr. Fraiman:

Q. Were you in communication with anyone in New York prior to the arrest? A. Yes.

Q. With whom, sir? A. With one of our men in the office, I don't recall the name offhand, but I had tried to get the District Director but he was not available, and I told this other (1491) officer of ours that I would appreciate it if he would try to reach the District Director and to tell him that I was sending up Mr. Schoenenberger to confer with him on a case that evening, to be sure that Mr. Murff, the district director, would not have made any engagements.

Q. Did you have any other conversations with anyone in New York after that but prior to the arrest? A. None that I recall.

Q. Did you speak to anybody at the Federal Bureau of Investigation in New York? A. No, sir.

Q. When were you first notified that an arrest had been made?

Mr. Maroney: Objected to as immaterial, your Honor.

The Court: Sustained.

By Mr. Fraiman:

Q. After the arrest had been made did you have a conversation with Mr. Schoenenberger or anybody else in immigration? A. Yes, sir.

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Mr. Maroney: Objected to as immaterial, your Honor.

The Court: Objection sustained.

(1492) By Mr. Fraiman:

Q. After the arrest had been made did you have a conversation with anybody at the Federal Bureau of Investigation in New York concerning this matter?

Mr. Maroney: Objection.

The Witness: No, sir.

The Court: Sustained.

By Mr. Fraiman:

Q. Did you participate, sir, in the preparation of the order to show cause and the deportation warrant that was prepared in this matter? A. To a—only in a supervisory capacity.

Q. Would you describe what you did? A. I didn't prepare them myself, but I saw them after they had been prepared, and I was satisfied with it.

That was the extent of my participation.

Q. Prior to its being prepared? A. Pardon?

Q. Prior to these papers being prepared did you discuss with anyone, or instruct anyone as to what the subject should be charged with?

Mr. Maroney: Objected to as immaterial, your Honor.

The Court: Isn't it covered in Mr. Schoenenberger's testimony?

Mr. Fraiman: This man is Mr. Schoenenberger's superior, your Honor.

The Court: I know, but what more do you want to tell about it? He told you how the papers were prepared.

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Mr. Fraiman: I don't think that this would take much time, your Honor.

The Court: I hope it won't.

Mr. Maroney: Your Honor, it has become perfectly obvious that all counsel is doing is fishing, hoping something will turn up; and I think that he has no indication or idea of producing anything of relevance to this hearing.

The Court: I don't think that this examination tends to demonstrate your major thesis, which I understand to be that the arrest was a mere subterfuge—that is what you are urging on the Court,—and I don't think you are making any progress in your present examination of that along that line.

Mr. Fraiman: Your Honor, I think I have just a few more questions and then will be through with this witness.

The Court: I don't think you have very many (1494) more.

The papers were prepared and Mr. Schoenenberger told you about them, and they were served.

Please go on to something material, and helpful.

Mr. Fraiman: What I am trying to ascertain, your Honor, is who made the decision as to what this man should be charged with, and I submit it is material.

The Court: Hasn't the witness told you he made the decision?

Mr. Fraiman: If he has, your Honor, I should be satisfied, if he made the decision.

The Court: Haven't you told us that?

The Witness: I made the decision.

Mr. Fraiman: I have no further questions.

Mr. Donovan: Your Honor, rather than my undertaking to ask these questions and getting into a dis-

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cussion as to whether or not I am asking him for legal conclusions, or anything of that kind, could we not, because of the discussion which we had yesterday on this point, take advantage of this man's being here to clear up something that—

The Court: Have you got a question to ask him?
(1495) Mr. Donovan: Yes, your Honor.

The Court: Ask him the question.

Mr. Donovan: What I would like to know is,—

By Mr. Donovan:

Q. You stated, as I understand you, that you made a decision that deportation proceedings should be commenced; is that correct? A. Correct.

Q. That was your statement.

Now, what I am trying to understand is that yesterday his Honor and we had a discussion with respect to the fact that to illegally enter the United States is a crime. Is that correct? A. Yes.

Mr. Maroney: Objection, your Honor.

It seems to me this is strictly a legal argument.

Mr. Donovan: It isn't, your Honor.

The Court: If you have got a question, Mr. Donovan, please ask it. Don't indulge in a recitation.

Ask the witness a question.

I suppose the two counsel are entitled to interrogate one witness, but some time or other, this (1496) inquiry has got to come to an end.

Mr. Donovan: Your Honor,—

The Court: Ask him a question, will you, please.

Mr. Donovan: I did, your Honor, and Mr. Maroney objected.

Would you read the question?

The Court: Will you read the question, please?

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(Whereupon the question was read as follows:

— “Q. Now, what I am trying to understand is that yesterday his Honor and we had a discussion with respect to the fact——”)

The Court: Strike it all out. That is a recitation.

Ask him a simple question. Is it an offense for a man to enter the country illegally, to your knowledge?

By Mr. Donovan:

Q. Yes or no? A. Yes, sir.

Q. Is this a criminal offense punishable in some manner other than deportation?

The Court: That is a question of law. I think if you will look at the citations that I gave you yesterday you will find the answer.

(1497) Mr. Donovan: In the event——

The Court: Mr. Donovan——

Mr. Donovan: Yes?

The Court: The purpose of this inquiry, if I understand the defendant's purpose, is to establish that the Immigration Bureau indulged in an idle thing—a pretense.

Now, please don't get into an argument about the law in order to demonstrate that.

Mr. Donovan: Your Honor, all I was trying to bring out is that, as I understand it, there are two procedures,——

The Court: All right.

Mr. Donovan: —within Immigration; one, if they are going to deport the man and one if they are going to indict him for a crime.

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The Court: Very good, and he has told you the election he made was to institute deportation proceedings, period.

What more do you want to know?

Mr. Donovan: I was just trying to establish that that decision meant that he was deciding not to follow the road of charging the man with a crime.

The Court: Ask him whether they discussed the (1498) question of prosecuting the man for violation of the law.

Mr. Donovan: Very well, your Honor.

By Mr. Donovan:

Q. Was there any discussion with the F. B. I. or in your own service as to whether or not the man should be prosecuted criminally for a violation of the law? A. Within the Immigration Service, yes.

Q. Was there a discussion of this with anyone in the F. B. I.? A. I don't recall whether that was discussed with them, but it was discussed within my own office, with my own people.

Q. And the decision was reached, in any event, that you would not take such procedures as you would follow for criminal prosecution, but, instead, would commence deportation proceedings; is that correct?

Mr. Maroney: I object to that.

The Court: I will allow it. I will allow it.

The Witness: My decision was to institute deportation proceedings.

Mr. Donovan: Thank you, sir.

The Court: Now, we knew that eight minutes ago.

(1499) *Cross examination by Mr. Maroney:*

Q. Mr. Noto, you were interrogated concerning your conferences with the F. B. I. immediately preceding the

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arrest of the defendant here, Mr. Abel. Do you recall that?

A. Yes, sir.

Q. Now, were you in a position, when I say you, I mean the Immigration & Naturalization Service, as of June 20th, 1957, to make a positive identification of the defendant for the purposes of making an arrest? A. For deportation?

Q. Yes. I am talking about a positive identification of the man that was involved in the deportation proceeding or the proposed proceeding? A. I am sorry, but I don't follow the question.

Q. My question is, did you desire the assistance of the Federal Bureau of Investigation in identifying the person who was the subject of the Immigration warrant?

Mr. Fraiman: I object to the form of the question, your Honor.

It may be that it may relate whether he had conversation with the F. B. I., but his desire I submit is irrelevant.

(1500) The Court: I suppose that is correct.

I think he may be asked whether they had sufficient information concerning the identity of the subject to act without consultation with the F. B. I.

Q. Could you answer that question? A. Yes, sir. The Immigration had sufficient information in its possession to act independently for deportation purposes.

Q. All right. Now, my next question is, did the Immigration Service, did you desire the assistance of the F. B. I. in making the personal identification of the person to be arrested?

Mr. Fraiman: Objection, your Honor. He is also asking for the desires of the witness.

The Court: I will allow it.

Mr. Fraiman: He is also asking a question that has already been answered, that is, that he had suffi-

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cient information to make this arrest without the assistance of the F. B. I.

Mr. Maroney: This is cross examination, your Honor.

The Court: Perhaps counsel didn't hear me. I said I would allow it.

Q. Do you understand the question, Mr. Noto? (1501)

A. I think I do.

Q. Will you answer the question, please? A. I don't—my recollection is that we didn't need any assistance at that point.

Q. You had been furnished with photographs of the defendant? A. I don't recall if we had been furnished with a photograph; but we had sufficient identifying information.

Q. But would it have been of assistance to you in making a positive identification?

Mr. Fraiman: I object, your Honor, it is speculative.

The Court: I will sustain the objection.

Q. Prior to the arrest of the defendant, here, by the Immigration officers on June 21st, did anyone request you to cause a search to be made by the Immigration officers for evidence of espionage at the time of the arrest? A. No, sir.

Q. Now, you stated also, I think, in response to Mr. Donovan's inquiries, that you decided to commence a deportation proceeding. Is that correct? A. That is correct.

Q. Now, under the law the election to commence de- (1502) portation proceedings would not foreclose the bringing of a subsequent criminal prosecution?

Mr. Fraiman: I object to that, your Honor.

The Court: Well, you have asked several questions of law and I have allowed you to get away with it.

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Mario T. Noto, for Defendant—Re-direct.

Now, this is again a question of law.

Mr. Maroney: I quite agree, your Honor. I merely want to bring it out because of their using testimony—

The Court: I think that that is a matter of argument. However, this gentleman is an expert, I presume, in his field and he may answer the question.

A. It does not.

Mr. Maroney: Thank you. No further questions, your Honor.

The Court: I would like to ask the witness a question.

I presume it is a matter of common knowledge, but it ought to be in the record.

Is the Department of Immigration under the Department of Justice a bureau or a department in the Department of Justice?

The Witness: Yes, sir.

(1503) The Court: Is the F. B. I. also a bureau or branch of the Department of Justice?

The Witness: Yes, sir.

The Court: Over the years has it been usual or unusual for those two departments to work together on a given case?

The Witness: It is usual and mandatory that we work together.

The Court: All right. Thank you.

Mr. Donovan: Well, your Honor, may I ask one further question along those lines?

The Court: Yes.

Re-direct examination by Mr. Donovan: _____

Q. Would the decision to commence deportation proceedings only at this time be made by Immigration or by

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the Department of Justice? A. It would be made by the Immigration Service.

The Court: I think that is all.

Are there any other witnesses to be called?

Mr. Donovan: I don't believe so, your Honor.

I think that this testimony has brought out the pertinent facts to the arrest and search and seizure (1504) ure.

The Court: Let's have the recourse to this list of these items taken from the wastebasket. That is unfinished business, I think.

We had an understanding yesterday about the items listed in the affidavit upon which this motion is based.

I think that I am correct about that, that affidavit refers to a schedule, doesn't it?

Mr. Donovan: Yes, your Honor, which had been attached to one of the Government's warrants.

The Court: And we had a discussion and there were two added items, two birth certificates, and they, I understand, are comprehended in the motion.

Mr. Donovan: That is correct, your Honor.

The Court: Now, what about this list of contents of the wastebasket?

I understand it to be the Government's position that as to those articles, all of them, legally the defendant abandoned them. He threw them away.

Mr. Tompkins: That is correct, your Honor.

The Court: Do I understand that the defendant has requested the return of all of those articles (1505) that were in the wastebasket?

Mr. Fraiman: Yes, your Honor.

The Court: And that the list of items on this sheet of paper that was furnished to me yesterday is accurate, is it?

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Mr. Fraiman: So far as we know, yes, sir.

The Court: Well, now, is this a correct statement, that as to the items listed on this sheet of paper, namely, the contents of the scrap basket, the Government is willing to consider that all but the following, namely, one piece of garnet paper and rubbing block and four pencils, from three to five inches in length, can be disposed of in the same way that certain of the items appearing in the schedule were disposed of yesterday, namely, they are not considered to be within the motion?

Is that correct?

Mr. Tompkins: I just want to check one thing, your Honor.

Mr. Maroney: Those two things are within the motion, your Honor. Those are the things that the Government has an interest in.

The Court: Well, the ones here that I referred to. (1506) Mr. Maroney: Yes, sir.

The Court: That is a piece of garnet paper and a rubbing block and the four pencils.

Mr. Maroney: I think the two pieces of green wire are of interest to the Government, also, your Honor.

Mr. Tompkins: That is the last item, your Honor.

The Court: The two pieces of green wire.

So that makes, I think, three items contained on this schedule, one item is a piece of garnet paper, another item is four pencils, and a third item is two pieces of wire with green covering.

Mr. Maroney: Your Honor, I am sorry. I think we made a mistake in describing the wire.

I am sure it is one roll which is four items above which comes between the other two.

The Court: I think that we have the wrong one.

Mr. Tompkins: We designated the wrong one.

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The Court: You are substituting the roll of green wire for the two pieces of wire.

Mr. Maroney: That is correct.

The Court: Now, except as to those three items, as I understand them, the balance may be treated as (1507) we treated the excluded items yesterday, namely, it is understood that the defendant had asked for the delivery of those items and the Government has no objection to his doing it, and then the defendant said, as a matter of convenience to him, let them stay in the Government's custody.

Is that correct?

Mr. Fraiman: That is correct.

Mr. Tompkins: That is correct.

The Court: Now, is it satisfactory if I attach this list from which I have just been reading to Schedule D-4?

Mr. Tompkins: Your Honor, there is just one thing that we would like to point out in connection with this.

We have taken a legal position that the defendant is not entitled to claim any ownership of these properties.

The Court: I thought I stated that.

I mean to, if I didn't.

Mr. Tompkins: We don't want to be put in a position in any way of agreeing in any way insofar as the defense has made a formal request for the return of these items—

(1508) Mr. Fraiman: Yes, we made that request. We are doing it now.

The Court: And without prejudice to the legal question, the Government states that the items other than the three that I have been talking about are deemed to be in the same category as the excluded items that we discussed yesterday.

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Mr. Tompkins: That is correct.

The Court: Now, as to the subject matter in this hearing, it is my understanding that the defendant has undertaken to demonstrate that the arrest of Abel on June 20th, by the Immigration Authorities, was a mere subterfuge, that it had no real purpose except to mask the intentions of the F. B. I. to seize evidence at an instant of that arrest and possible search, is that the defendant's position?

Mr. Donovan: Not that at all, your Honor.

The Court: Then I misunderstood you.

Mr. Donovan: The defendant's position is in the affidavit which I submitted to the Court yesterday and which states that it is the position of the defense that the principal objective of the Department of Justice in conducting the search and seizure (1509) at the Hotel Latham on the morning of June 21, 1957, was to discover espionage materials believed to be in the possession of a suspected Soviet agent in Room 839, and it is our contention, your Honor, that if such was the true objective of these proceedings, that under the Harris case, that these articles must be returned and suppressed as evidence in any criminal proceeding.

The Court: Because the search was not conducted in good faith?

Mr. Donovan: And the articles were not contraband.

We respectfully say that in the Harris case, you had a five to four decision, and the sole reason in that case, which I submit, would be the sole reason in that case why you got the majority of five was because of two grounds:

1: Good faith in that they are the officers, when they entered the room for the checks, had no knowl-

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edge of the draft cards and on such a finding the Supreme Court held that there was good faith on their part and secondly the Court said that in any event that the possession of these materials was a felony being committed in (1510) the presence of the officers, and accordingly these things were contraband.

Now, those two things, your Honor, were involved in that case.

We respectfully submit that neither of those is present here.

The Court: In the Harris case there is a very understanding and very sensible and a very helpful opinion therein by the Chief Judge Vincent that he had a complete understanding of that case and all that was involved in such matters.

Would you be willing to add that to your statement?

Mr. Fraiman: It is the majority opinion that we rely on.

Mr. Donovan: We are not relying on the minority opinion, your Honor.

We recognize the opinion of the Chief Justice as law and we are saying that under the rationale of that decision, we believe that that should be determinative of this case.

Mr. Fraiman: None of the materials seized, according to the testimony of Farley, who made the search here constituted evidence of nationality (1511) or alienage.

Mr. Farley testified to that, and the Harris case and other cases say that where a search is conducted pursuant to a warrant, the only things that can be seized are the fruits or instruments of the crime charged in the warrant or contraband or weapons used which might possibly be used to effectuate the subject's escape.

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The Court: What do you say about the birth certificates?

Have they anything to do with Abel's having entered this country illegally?

Mr. Fraiman: I don't believe they do, and Farley said they did not.

Mr. Maroney: That certainly doesn't seem to us what Mr. Farley testified to that nothing was found which indicated that.

He said he didn't see anything in the room which related to nationality.

Mr. Donovan: I believe he said that he had seen these birth certificates, your Honor.

The Court: I am going to read into the record, because I think that it contains words of wisdom, a decision in the Second Circuit in the case of (1512) Charles Ginsberg, dated February 13, 1945, Judge Hutcheson apparently sitting in this Circuit by designation, speaking for a Court which included Judge Clark, used the following language, at page 750:

"Based on the Fourth and Fifth Amendments, this is another of those cases in which appellant and appellee, concerning themselves little with the Constitutional words, seize upon particular words in particular cases to roll them as sweet morsels under their tongues. It may not be doubted that, in respect of searches and seizures, the decisional gloss which constitutes the common law of the Constitution has created in the Federal Courts a climate of opinion favorable to the citizen, less favorable to his oppressors. Neither may it be doubted that particular decisions have not only struck down particular oppressors but in their vigor and clarity have set up streams of tenancy in accord with which later decisions have run. It remains true, however, that each case of this kind is a fact case. The correct decision of each

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depends not so (1513) much upon a higher critical examination of the accumulated decisional gloss as upon a common sense determination of whether, within the meaning of the word the Constitution uses, the particular search and seizure has been unreasonable, that is, whether what was done and found bears a reasonable relation to the authority then possessed and exercised or transcends it to become oppression."

I propose to be guided by that impression.

Now, it is ten minutes of one. I propose to hear each side. Do you wish to start now or do you wish to have me take a recess and resume at two o'clock?

Mr. Fraiman: We prefer to resume at two o'clock.

The Court: Is that satisfactory?

Mr. Tompkins: That is satisfactory.

Mr. Donovan: To hear further argument on it?

The Court: Yes

I understand there was no testimony on the—

Mr. Donovan: To be perfectly frank, we have submitted voluminous briefs. (1514) We have, of course, argued this repeatedly, both the Government and ourselves.

I don't want your Honor to think that we have more greater and more brilliant thoughts on the subject. Our whole argument is before you.

The Court: I propose you to state what the testimony in this hearing indicates to substantiate your position.

Shall we say two o'clock?

Mr. Donovan: Well, your Honor, in order to properly do that, if I may respectfully suggest this, I should far prefer, and this has no bearing on the trial date or anything of that kind, but I should prefer to review this transcript.

The Court: If you don't want to argue now, Mr. Donovan, you don't need to do it.

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Mr. Donovan: Could your Honor—

The Court: I am going to have argument at two o'clock. If you wish to do it then, do so; if you do not, don't.

(Luncheon recess.)

(1515) AFTERNOON SESSION.

2:00 o'clock P. M.

Mr. Maroney: Your Honor, before going into the argument, the Government has a motion addressed to the affidavit which was filed this morning and executed by the defendant, Mr. Abel.

It was our understanding that this affidavit was to be submitted in response to a request made by us that claim to the ownership of the property in the wastebasket be made as a prerequisite to bringing the motion.

Now, the affidavit which has been submitted complies with that except that it adds certain facts which were not called for and which, we feel, are inappropriate to put in an affidavit at this stage since a hearing has been ordered by the Court and was held by the Court; so we feel that in paragraph 2, in the body of the affidavit, at the bottom of that paragraph he said, "All such items also belong to me and it was not my intention to abandon them."

We feel, and we hereby move to strike the portion of this affidavit following the word "me" in that sentence.

(1516) The Court: Following the word "me"?

Mr. Maroney: That is right, to the rest of that paragraph, and also the last full paragraph we feel should be stricken as not being evidence properly submitted in connection with this hearing.

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The Court: I will reserve decision.

Mr. Fraiman: May I be heard on that, your Honor?

The Court: I said I would reserve decision. Do you wish to be heard on it?

Mr. Fraiman: I would like to merely explain why we have included this material in the affidavit, your Honor.

The Court: You agree that it does fall short of a claimed—explicit claimed ownership, don't you?

Mr. Fraiman: I don't believe it does fall short of an explicitly claimed ownership, your Honor.

We say very clearly that on page 2: "All such items also belong to me," with respect to the items found in the wastebasket. I believe that is as plain as we can make it, your Honor.

(1517) The Court: That is in the past tense, isn't it?

Mr. Fraiman: I will be glad to amend that.

The Court: I mean that isn't inconsistent with an intention, when he threw them in the scrap basket, to throw them away, is it?

Mr. Fraiman: I would be glad to strike out the words—consent to strike out "ed," of "belonged," to make it the present tense, your Honor. That was done inadvertently.

The Court: I don't think that the Government's attitude is that prior to the time that the articles were thrown in the scrap basket, they did not belong to the defendant.

I think the Government's attitude is that he voluntarily relinquished his title to them by throwing them in the scrap basket.

I think that that is their contention.

Mr. Fraiman: It was the intention of this affidavit to state that the defendant did not intend to

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relinquish title to those items after he threw them in the scrap basket.

The Court: I am reserving decision.

The motion is to strike a certain portion of (1518) the affidavit.

Mr. Maroney: Yes, your Honor.

Mr. Fraiman: I would like also to indicate, your Honor, that the Government submitted three affidavits on September 30th, more than ten days after this motion had been filed with Judge Ryan, three additional affidavits stating additional facts that had not previously been stated.

The Court: They didn't do that until after the motion was made in this court, did they?

Mr. Fraiman: No, they did not, your Honor.

The Court: You see, the legal situation is, I think, that you stated that the motion concerning which Judge Ryan had declined jurisdiction without prejudice was then being made in this court and the Government waived notice of that motion and agreed that it be taken under advisement.

Isn't that the situation?

Mr. Fraiman: Yes, your Honor.

The Court: Thereafter, and in connection with the motion in this court, defendant's affidavits were filed. Isn't that it?

Mr. Fraiman: Yes, your Honor, and this affidavit (1519) was meant to comply with what your Honor requested we submit in the affidavit and also to be partially in answer to the affidavits previously submitted.

The Court: All right.

Mr. Tompkins: Your Honor, may Mr. Fraiman and I approach the bench for a minute on another matter?

The Court: Surely.

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(Whereupon Mr. Tompkins and Mr. Fraiman conferred with the Court at side-bar.)

Mr. Fraiman: Prior to our oral argument on this motion, your Honor, I wonder if I might inquire of two items?

First, with respect to the amount of the bill that was paid at the Hotel Latham: I wonder if the Government at this time has that figure that they had agreed to stipulate to?

The Court: Will you explain to me why the exact amount of the bill is important?

Mr. Fraiman: Your Honor, it goes to this question as to when he was checked out of the hotel. It is our contention—

The Court: That isn't the amount; that is (1520) the time.

What is the importance of the exact amount?

Mr. Fraiman: It is our contention that he paid for the room throughout Friday, for all of Friday and therefore was entitled to the room throughout that day and the F. B. I. could not go into the room to search the room so long as that room actually belonged to him, even though he was not physically present in the room.

I had understood from Mr. Palermo this morning that the figure was approximately \$25.00.

I was wondering if the Government would agree to stipulate that was the approximate amount of the bill?

Mr. Maroney: I think that we could stipulate to the amount of the bill, your Honor, but I don't think there is any evidence it shows the termination date of his occupancy of the room, which is the crucial thing here, and not how much money he owed.

Mr. Fraiman: We are not prepared to argue that point now. All we want is a stipulation of this

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amount; if they are willing to stipulate as they indicated they were. I do not intend to argue the (1521) point now, your Honor. I think the affidavit and the record speak for themselves.

The Court: The bill was paid at approximately eight o'clock in the morning, wasn't it?

Mr. Fraiman: Yes, your Honor.

The Court: The suggestion you make is that the payment included the right to occupy the room for the balance of June 21st?

Mr. Fraiman: Yes, your Honor.

The Court: I suppose that it would be the hotel that would tell us that.

Mr. Maroney: It is our understanding, your Honor, that there had been a payment through the preceding Saturday.

The Court: Which was?

Mr. Maroney: And I am not sure of the amount.

Mr. Fraiman: If it was at the rate of \$4 a day—

The Court: The date of the preceding Saturday? I can tell you. Saturday was June 15th.

Mr. Maroney: That is right, and on that date (1522) he had paid—

The Court: June 20 was a Thursday, and therefore, June 21 was a Friday.

Mr. Fraiman: Yes, your Honor, that is correct.

Mr. Maroney: And he was paid up into Saturday the 15th.

The Court: Had he paid for Saturday or to Saturday?

Mr. Fraiman: For Saturday.

Mr. Maroney: My understanding is it is to Saturday.

Mr. Fraiman: My understanding is that it was for Saturday. The rental was \$4 a day, at any rate, whatever it was that was paid.

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The Court: I guess you will have to find that out from the hotel. You probably can agree what the hotel would testify to on the subject.

Mr. Maroney: Put it this way: Our information is, your Honor, that on Friday morning at the time of his arrest he owed the hotel for six days at \$4 a day, which was \$24.

The Court: The first would be the 15th.

Mr. Maroney: The first would be the 15th.

Mr. Fraiman: Sixteenth, your Honor. I think (1523) Mr. Palermo agrees.

Mr. Palermo: I think the sixteenth would include six days: Sunday, Monday, Tuesday, Wednesday, Thursday and Friday.

The Court: I would so like to get down to the argument.

Mr. Fraiman: Can we get back to the stipulation of the \$25 your Honor?

May I ask if they are willing to stipulate to that figure? We are not interested in anything else right now.

The Court: Can't you agree on the amount that was paid?

Mr. Maroney: \$25.20.

Mr. Fraiman: That is all I want.

The Court: That is your understanding?

Mr. Fraiman: Yes, your Honor.

The other item, your Honor, I wish to inquire about is that in yesterday's proceedings the Government indicated it would make available to your Honor for your Honor's inspection a copy of the F. B. I. report that was turned over to the Immigration and Naturalization Service.

The Court: Now, will you go on with your argument, please?

Mr. Fraiman: Yes, sir.

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With respect to the report, your Honor, I was wondering if the Government had complied with that request?

Mr. Tompkins: Your Honor, the Government is happy to make this available for the Court's inspection.

(Mr. Tompkins hands document to the Court.)

The Court: You want me to look at it before you argue?

Mr. Fraiman: Not necessarily, your Honor.

The Court: I have read this report, and I find nothing in it that could be interpreted as a suggestion that the individual referred to in that report, who has since been established to be the defendant in this case, should be made the subject of inquiry by the Immigration authorities for the purpose of having him arrested as a cover for an investigation by the F. B. I., or in the hope that the arrest and every incident thereto would afford information to the F. B. I. in connection with the alleged character and activity of the defendant.

Mr. Fraiman: Might we respectfully request, (1525) your Honor, that the report be sealed and made a part of the record of this case?

The Court: Any objection to sealing it so that a reviewing court can see whether I have stated that accurately or not?

Mr. Fraiman: I have no question of that, your Honor.

Mr. Tompkins: No, your Honor, there is not.

There is one sentence in here that is not at all germane that I would like to point out to your Honor.

May I approach the bench with Mr.—

The Court: Just tell me in what paragraph it occurs, if you don't want to read the sentence into the record.

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Mr. Tompkins: It is the third sentence. That is just the informant that we would prefer not to—

The Court: What is your comment as to that, please?

Mr. Tompkins: We would like, your Honor, to have that excised, if it is going to be sealed. I am—

The Court: I am wondering if I excise anything (1526) that will not defeat the purpose of sealing the report?

Mr. Tompkins: All right, your Honor, I will withdraw the suggestion.

The Court: If it is to be sealed, does that mean that it is to be sealed and left with the Court, or what happens to it, as a matter of fact?

Mr. Fraiman: We would have no objection to leaving it with the Court. We don't intend to look at it and we know that we are not entitled to look at it.

Mr. Tompkins: I would be glad to leave it with the Court.

May I substitute a true copy in lieu of the original?

The Court: The only trouble in leaving it with the Court, the Court becomes responsible for it.

Mr. Fraiman: I have no objection to leaving it in the Government's custody.

The Court: Let's leave it in the Government's Custody and endorse on the envelope, please, what it is.

Mr. Tompkins: May we insert a true copy in (1527) stead of the original?

The Court: I should think that that would be satisfactory.

And that it is in your custody pursuant to what appears in the record of this day on the subject. Just endorse that on the envelope.

Mr. Tompkins: Thank you, your Honor.

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[SAME TITLE.]

(1561) BYERS, D. J.:

This is a defendant's motion made in this court on October 2, 1957 under F(R. Cr. P. 41(e) for the return and suppression for use as evidence, of any and all property seized on June 21, 1957 in Room 839 of the Hotel Latham (Manhattan) because, as alleged, such property was illegally seized without warrant and contrary to the Fourth and Fifth Amendments to the Constitution.

(1562) Hearings were conducted in open court on October 8 and 9, by way of supplementing the original affidavit of the defendant verified September 13, 1957, which was filed as part of a special proceeding in the Southern District. Pursuant to the opinion of Judge Ryan of that court dated October 2, that proceeding was dismissed with leave to the defendant to move in this court.

By affidavit filed October 8, the defendant's chief counsel thus succinctly states the issue:

"The defendant maintains that the true objective of the Department of Justice in conducting the search and seizure at the Hotel Latham on June 21, 1957 was to obtain any espionage material possessed by a suspected Soviet agent in Room 839;

"The Government, in the affidavits most recently submitted in its behalf, apparently denies this contention."

On June 21, 1957 the defendant was arrested at his room in the said hotel at about 7:30 a. m. by agents of the Immigration and Naturalization Service (which is an integral part of the Department of Justice), pursuant to a warrant of arrest issued by the Department of Justice (Immigration and Naturalization Service) bearing date June (1563)

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20, 1957; at that time there was served upon him an order to show cause in which it is recited that it appears that he is in the United States in violation of law in that he is not a citizen or national of the United States but is a national of Russia, namely, the Union of Soviet Socialist Republics, and that he entered the United States at an unknown point across the border from Canada, in 1949.

That he failed to notify the Attorney General of his address during January of 1956 and during January of 1957; that he did not furnish notice of his address because he feared that by so doing he would disclose his illegal presence in the United States; that he is subject to being taken into custody and deported pursuant to Section 241 (a)5 (8 U. S. C. §1251) of the Immigration and Nationality Act, having failed to furnish notification of his address in compliance with Section 265 of that Act (8 U. S. C. §1305), and had not established that such failure was reasonably excusable or was not wilful. The defendant was named in both the warrant and the order to show cause as Martin Collins alias Emil R. Goldfuss.

All papers used in the Southern District are now before this court on this motion.

At the request of the defendant a hearing was conducted on October 8 and 9 for the purpose of taking the (1564) oral testimony of the Government agents whose affidavits had originally been filed in opposition to the motion.

The following witnesses testified:

Robert H. Schoenenberger, a Supervisory Investigator with the Immigration and Naturalization Service, U. S. Department of Justice;

Edward J. Farley, a Supervisory Investigator with the Immigration and Naturalization Service;

Lennox Kanzler, Divisional Investigator with the Immigration and Naturalization Service;

Paul J. Blasco, Special Agent of the F. B. I. assigned to the New York Office;

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Mario Noto, Deputy Assistant Commissioner for Special Investigations, United States Immigration and Naturalization Service.

The first three witnesses testified to what took place on the occasion of the arrest of the defendant. It is to be remembered that he had not thus far disclosed his true name; the warrant for arrest and order to show cause having been issued by the Immigration authorities, as stated, were in the possession of Schoenenberger, and he, with Edward Farley and Edward Boyle, Immigration Investigators, entered the room of the suspect at about 7:30 a. m., and it was approximately at that hour that the arrest was made.

(1565) Special Agents of the F. B. I. Gamber and Blasco, pursuant to agreement with the Immigration officials, had entered Room 839 in that hotel at about 7:00 o'clock, and they interviewed the person who subsequently proved to be this defendant; as Blasco testified, their object was to induce him to cooperate in their efforts to learn something about this individual. Another Special Agent, Phelan, was also present, and all three identified themselves and stated the reason for their presence.

Blasco's testimony is quite explicit as to the questions which they asked after having explained their special duty involved alleged violations of matters touching the internal security of the United States and that such was the special object of their inquiry.

The man then known as Collins was asked his name, the date of his birth which he first stated to be either June 15 or July 15, 1897, but he did not explain why he first gave one month and then the other; he stated that he had been born in New York City and that he lived at the hotel but did not answer when asked how long he had resided there; the same silence met the question as to where he had lived prior to coming to the hotel. He said that his mother's name was Mertha Collins and that her maiden name was

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Rollins. He stated that he was not employed and had not (1566) been for some time; he failed to state when he had been last employed or to give the name of his father. He stated that he had no brothers or sisters or other relatives in the United States; that he had resided most of his life in New York City.

He was told that the Agents would like to have his cooperation in answering these questions and that if he failed to render such, he would be placed under arrest before leaving his room.

Blasco's testimony is convincing to the effect that this is the only cooperation which the Agents sought; he also stated that during the interview Agent Gamber did address the then supposed Collins as "Colonel," and that he did so because of certain information which had developed in the F. B. I. investigation of the person known as Collins.

In view of the failure of the F. B. I. Agents to elicit the information that they sought, they then signaled to the waiting Immigration officials who entered and placed the defendant under arrest; in connection with that arrest they made a search of his person and his belongings and also of certain articles which during the course of the search he threw into a convenient scrap basket.

Thereafter he was taken to the headquarters of the Immigration Service in New York City. Subsequent (1567) developments are not germane to this inquiry.

The foregoing is a summary statement of what took place on June 21, 1957.

Based upon the allegations of the various affidavits and the testimony taken at the hearing, the defendant advances the argument that his motion should be granted because:

(1) The search incidental to his arrest was illegal since a deportation proceeding is not criminal in nature.

(2) If the foregoing is decided against him, that the search should be deemed to be illegal and not made in good

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faith, for the reason that the Department of Justice used the deportation procedure and the incidental arrest in bad faith; that the ultimate purpose was to secure evidence as the result of a search which could be used in a prosecution for the alleged violation of our espionage laws, although at the time that the arrest and search took place, the Department was not in a legal position to institute a criminal prosecution based upon the alleged violation of the espionage statutes.

As to the first contention, no good reason appears for sustaining the defendant's argument.

Deportation obviously is not a civil cause involving only the rights of one individual as against another. (1568) Such a proceeding is initiated in the interests of the United States and for the protection of its citizens; while it carries no penal sanction, it does involve arrest and detention, and thus more nearly resembles a public offence than is a cause resting in mere tort or breach of contract. The basis upon which a final order may be duly entered may well be established as the result of a search of the suspected person and his effects, and to argue that the Constitution forbids the Government thus to act in the public interest is to state a proposition to which this court cannot agree.

Both sides have stated that there are no decisions directly on this point, nor has the court been able to discover one, and thus it is a matter of first impression; however I can think of no reason why a search made in connection with such an arrest as this should be regarded as any less valid than one based upon an arrest made in a proposed criminal cause.

Turning to the second argument, the evidence is persuasive that the action taken by the officials of the Immigration and Naturalization Service is found to have been in entire good faith. The testimony of Schoenenberger and Noto leaves no doubt that while the first information that came to them concerning the man then known as Collins, who later admitted that his true name is Abel, was fur-

Opinion on Motion to Suppress.

nished by (1569) the F. B. I.—which cannot be an unusual happening—the proceedings taken by the Department differed in no respect from what would have been done in the case of an individual concerning whom no such information was known to exist.

The defendant argues that the testimony establishes that the arrest was made under the direction and supervision of the F. B. I., but the evidence is to the contrary, and it is so found.

No good reason has been suggested why these two branches of the Department of Justice should not cooperate, and that is the extent of the showing made on the part of the defendant.

In the original affidavit filed by Mr. Donovan that which amounts to an argument is presented, to the effect that having certain information believed to be true concerning this defendant, the F. B. I. was confronted with the necessity for at once initiating criminal proceedings against him for alleged violation of the espionage laws (in which event a search and seizure would have been appropriate), or by seeking to enlist his services in a counter-espionage effort.

The testimony of Blasco fails to indicate an effort to enlist this defendant in any counter-espionage activity. It is so found.

(1570) Even if the defendant's theory were to be accepted that the F. B. I. availed itself of the Immigration and Naturalization branch of the Department of Justice in effecting a prompt arrest, while the former was engaged in pursuing inquiries already under foot concerning this defendant, it is not apparent to this court that there is anything to be criticized in that procedure. The Department of Justice owes its first allegiance to the United States, and it is not perceived that an alien unlawfully in this country has suffered any deprivation of Constitutional rights in respect to the matters brought to light at this hearing.

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In reaching a conclusion, the court has carefully studied the case of *U. S. v. Harris*, 331 U. S. 145, and other authorities cited by respective counsel.

The decision in *In Re Ginsburg*, a Second Circuit case (147 Fed. (2) 749), points to the necessity for considering this motion solely upon the basis of the facts that are presented. As that opinion states:

“It remains true, however, that each case of this kind is a fact case.”

Before the hearing was entered into, certain specified items concerning which the motion was made, were eliminated by consent, and the decision was stipulated to confine itself to those items only which were thereafter (1571) deemed to be embraced. The record clarifies this subject.

It is to be realized that the illegal entry into this country as charged, took place over eight years ago, and continued residence here by this defendant merely projected for that period an illicit status; in order to preserve that status, concealment and clandestine coloration touching the matters alleged in the departmental order to show cause, had to be practiced.

The articles that were seized cannot be characterized as other than instrumentalities which were appropriate for employment by the defendant in the preservation of the false position that he had elected to create and continue to occupy.

That is certainly true as to the false-birth certificates and it would seem also to be true as to other paraphernalia and papers—three of which the defendant sought to conceal in his sleeve under the very eyes of the arresting officer—as well as certain of the articles he threw into a waste paper basket with the apparent intention of ridding himself of them.

Order on Motion to Suppress.

An affidavit verified October 10 by associate defense counsel has been filed this day and read by the court. Its contents do not enhance the arguments for the defense which have been stated above. The right is (1572) reserved to the United States to file an affidavit in reply.

The motion is denied as to all articles to which it is addressed. Submit order.

MORTIMER W. BYERS,
U. S. D. J.

Order on Motion to Suppress.

[SAME TITLE.]

(1583) This cause having come on to be heard on motion of the defendant to suppress for use as evidence all property seized on June 21, 1957, from Room 839 of the Hotel Latham in New York City, and the court having taken testimony of witnesses and having heard the argument of Arnold Guy Fraiman, Esq., for the defendant, and Kevin T. Maroney, Esq., for the Government, and being fully advised, it is

• ORDERED, that defendant's motion be and it hereby is denied in all respects.

MORTIMER W. BYERS,
United States District Judge.

Dated: October 21, 1957.

**Search Warrant of June 28, 1957, for Room 505
at 252 Fulton Street, Brooklyn, N. Y.**

(1086) Search Warrant.

**UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.**

IN THE MATTER

of

The Application for Search Warrant
of Room 505 on the 5th Floor of
the Building Located at 252 Fulton
Street, Brooklyn, New York, Rented
and Occupied by EMIL R. GOLDFUS,
Also Known as MARTIN COLLINS.

Search Warrant.

EASTERN DISTRICT OF NEW YORK, ss.:

TO ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION:

Affidavit having been made before me (supported by affidavits also made before me by Harry MacMullin and Edward A. Boyle) by Joseph F. Phelan, Special Agent of the Federal Bureau of Investigation, that he has reason to believe that on the premises known as Room 505 on the 5th floor of the building located at 252 Fulton Street, Brooklyn, New York, and within the Eastern District of New York, said Room 505 consisting of one room, there is now being concealed and secreted therein certain property, to wit, a certain Hallicrafters shortwave radio and related radio equipment; camera equipment, including microfilm and microdot equipment; bolts, earrings, batteries, cuff links, pencils and similar items which have been or are suitable to be fashioned into "containers" for the

*Search Warrant of June 28, 1957, for Room 505
at 252 Fulton Street, Brooklyn, N. Y.*

secreting and transmitting of microfilm, microdot and other secret messages; and tools with which to fashion such "containers", and microfilm, microdot and other messages, including coded communications, which material is fitted and intended (1087) to be used in furtherance of a conspiracy to violate the provisions of 18 USC 793, 794 and 951, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises as above described.

You are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it. Prepare a written inventory of the property seized, return this warrant, and bring the property before me within ten days of this date, as required by law.

Date: Brooklyn, New York
June 28, 1957

WALTER BRUCHHAUSEN,
United States District Judge
Eastern District of New York

[Affidavits of Joseph F. Phelan and Edward A. Boyle in support of The Application For Search Warrant of Room 505 are printed above at pages 47 and 53 as Exhibits E and F in Appellant's Moving Papers on the Motion to Suppress.]

Affidavit of Harry McMullen for Search Warrant.

[SAME TITLE.]

(1098) Harry Mac Mullin, [McMullen] being first duly sworn, deposes and says that he is a citizen of the United States, over 21 years of age, and is the Superintendent of

*Search Warrant of June 28, 1957, for Room 505
at 252 Fulton Street, Brooklyn, N. Y.*

the building located at 252 Fulton Street, Brooklyn, New York. On December 17, 1953, a man known to your deponent as Emil R. Goldfus, a photograph of whom is attached to this application as Exhibit A and made a part hereof, rented Studio 505 in the building at 252 Fulton Street in Brooklyn. The rental payments made by the said Emil R. Goldfus on this studio began on January 1, 1954, and have continued up to this time, the last payment having been made on April 26, 1957, to cover the rent for the studio through the months of May and June, 1957.

In his capacity as superintendent of the building at 252 Fulton Street, Brooklyn, your deponent has had occasion to visit Room 505 during the occupancy of said room by the said Emil R. Goldfus. In the course of such visit and while present in said Room 505, your deponent was able to and (1099) did observe a radio, which appeared to be a short-wave radio, various metal cylinders of film, camera equipment, and small tools.

To the best of your deponent's knowledge and belief, the said Emil R. Goldfus apparently was not engaged in the said Studio 505 in a profit-making business; and your deponent never saw customers enter this studio.

On or about April 26, 1957, Emil R. Goldfus stated to your deponent that he was going South on a seven-week vacation for his health to alleviate a sinus condition under orders from his doctor. Your deponent has not seen the said Emil R. Goldfus since on or about April 26, 1957, either at the building located at 252 Fulton Street in Brooklyn or at any other place.

Your deponent also has examined a photograph of the Hallicrafters radio, which photograph is set forth as Exhibit C to this application and made a part hereof, and is certain that the radio depicted in the photograph is not the same radio he had previously observed in the aforesaid studio of Emil R. Goldfus at 252 Fulton Street in Brooklyn.

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The radio in the studio, which was observed by your deponent, has a black metal case and does not appear to be new, as does the radio in the photograph.

HARRY McMULLEN.

Sworn to and subscribed before }
me this 28 day of June, 1957. }

WALTER BRUCHHAUSEN,
United States District Judge,
E. D. N. Y.

Return.

(1114)

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
201 East 69th Street
New York, New York

June 29, 1957

I received the attached search warrant June 28, 1957, and have executed it as follows:

On June 29, 1957 at 6:30 A. M. I searched the premises described in the warrant and I left a copy of the warrant with HARRY MACMULLIN, Superintendent, 252 Fulton Street, Brooklyn, New York together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. Book entitled "The New Astronomy".
2. One wooden box labeled "Swiss Files".
3. One Sucrets box containing nails.

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4. One "Empire" clothes brush.
 5. One lens in box marked Wollensak.
 6. One Hallicrafter Radio Serial AB-475506.
 7. One speaker for radio.
 8. One red box of 35mm color slides.
 9. One Sucrets box filled with miscellaneous small items, some hollow. i.e. cuff links and pieces of metal.
 10. One box marked "Jacobs Chucks" containing miscellaneous Radio Parts and two cuff links.
 11. One Norelco shaving box containing razor, cord, two buttons and one US 1902 nickel.
 12. One Sucret box containing film strips.
 13. One Sucret box containing film strips.
 14. One Sucret box containing miscellaneous cuff links, and metal objects.
 15. One red box containing miscellaneous radio tubes.
 16. One appointment card for Dr. John J. Daub with notations on reverse side.
- (1115)
17. One "Martinson's" Coffee can sealed with adhesive tape, believed to contain film.
 18. One cardboard box containing tools, bolts and other miscellaneous items.
 19. One small metal and wood tool.
 20. One roll of 35mm negatives with "Berkey" Photo Service" wrapper.
 21. One red box marked "Pavelle" color containing film strips.

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22. One Hallicrafter radio in brown leather carrying case.
23. One container of Kodak Ektachrome safety film.
24. One wooden box containing 3 wooden pencils, a bolt, two pieces of metal with holes in each, a metal gauge, two files, and miscellaneous pieces of metal, one tack and one clothes pin.
25. One Scholastic filler—Note Book #3109.
26. One book entitled "Cryptanalysis, a study of cyphers and their solutions."
27. Two metal containers containing film.
28. One map called "General Map" Bear Mountain-Hariman Section, Palisades Interstate Park.
29. Two yellow Kodak film cans with film.
30. One celluloid container, containing two negatives and one handwritten note.
31. One paper wrapped package 35mm slides.
32. One paper envelope containing what appears to be a map drawn on outside.
33. Five 35mm slides.
34. One box Kodak Sheet film.
35. One cardboard box containing unfinished tubes.
36. One slide rule.
37. One Sucrés box containing taps, rivets, washers and mirror wrapped in paper.
38. One Vacuum tube #CNU2X2/879.
39. One cardboard box containing envelopes of photographic colors.
40. One paper bag labeled "One quarter pound gum Traganath".

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(1116)

41. One Paper notebook.
42. One box called "M & B Promicrol and written on it is small drills, containing miscellaneous small tools.
42. One color slide sealed around edges with paper.
43. One RCA Electron tube #3V4.
44. One envelope marked 8 oz. Naples yellow lt.
45. One Bernz-O-Matic propane torch.
46. Two shaving brushes.
47. One Scotch tape metal box.
48. One leather strap having 2 screw on catches.
49. One can Kodak Super XX high speed film, 20 exposures.
50. One can Kodak Plus X Safety film, 36 exposures.
51. One can Kodak Plus X Safety film, 20 exposures.
52. One Standard Tool Company envelope containing notations and figures.
53. One invitation card from the President of the Council of National Academy of Design.
54. One white envelope containing Bill of Sale, 5 rent receipts and one woodland negative.
55. One plastic cup containing soft paper, waxes and other miscellaneous items including shaving brush.
56. One Eicor tape recorder with tape.
57. Three pencils, 2 ## Conte and 1 #2 Eagle.
58. One circular piece of brass.
59. One spool recorder tape manufactured by Audio Devices, Inc.

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60. One spool recorder tape in unmarked white box.
 61. One box containing a Starrett micrometer and a small microscope kit in leather zipper case.
 62. One envelope labelled Sol Goldwasser, 191 Canal Street.
 63. Four photographs.
 64. One briefcase, leather, brown containing many papers including musical scores.
- (1117)
65. Two hollow metal cylinders with removal ends.
 66. One Lincoln penny, 1955.
 67. One set drills in "Great Lakes Steel Corporation" holder.
 68. One red box marked "Leitz-Germany" containing two circular containers and five pieces of camera equipment boxes.
 69. 24 small boxes many of which contain film.
 70. One "Weller" soldering iron.
 71. One black paper pad.
 72. One "Starrette" Micrometer head.
 73. One metal flashlight containing two batteries.
 74. One wooden box containing watchmakers screw plate and tools.
 75. One torn paper bag containing nuts, washers, bolts and eight screw on bottle caps.
 76. One Harrison color attachment.
 77. One small metal punch.
 78. One Lens.

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79. One brass type gauge.
80. One watchmaker's eyepiece.
81. One small piece of wood containing 4 dots.
82. One box containing Adapt-A-Roll, 620 camera equipment.
83. One case containing Nomis Company compass set.
84. One small Huot drill index, with drills.
85. One piece of white paper bearing following: "510 E 11 H.L Wild"
86. One box Morse hand taps.
87. One Lufkin screw pitch gauge.
88. Two thermometers.
89. One Hagstrom map Queens New York.
- (1118)
90. One metal pencil, plastic box containing film, Kodak reducer & Stain remover.
91. One Dormeyer #200 drill.
92. One magnifying glass.
93. One thank you note Mr. & Mrs. Burton Silverman.
94. One business card White-Hixon Laboratories Inc.
95. One roll Kodak Super XX, 36 exposures.
96. One roll Kodak Ektachrome.
97. One Phillips type screwdriver marked "Stanley" #2732.
98. One black fountain pen.
99. One Hensoldt "Wetzler" magnifying glass.

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100. Two green colored crayon pencils.
101. One envelope containing drawing paper, graft paper and various technical pamphlets.
102. One color slide of woods scene.
103. One paper bag containing chalk.
104. One Preimer Street map of Chicago.
105. One Hagstroms map of Brooklyn.
106. One Texaco New York street map.
107. Two 35mm strips of film.
108. One grey scratch pad.
109. Two receipts from Lincoln Warehouse, New York City.
110. One box filter paper.
111. One Sinclair map New York and metropolitan New York.
112. One Texaco New York with Long Island map.
113. One pass book National City Bank of New York, 96 St. Branch.
114. Two sketch books.
115. Six matchbooks.
116. 21 assorted pencils.
- (1119)
117. Six screws.
118. Three boxes marked photographic paper containing photographs.
119. One speaker mounted on cardboard.
120. One record player.

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121. One clip pad with mathematical formulas.
122. One gray note pad with notation UN 5-4000.
123. One box containing 35mm film, tacks and matches.
124. One round plastic case containing some type of thread.
125. Six grey cardboard pencil shaped objects.
126. One yellow envelope containing small pieces of metal.
127. Three photographs of men and one of girl.
128. One Hoffritz Cuttlery receipt.
129. One schedule of International Mails.
130. One pamphlet concerning "Nikkor lenses".
131. One book labeled "Van Gogh".
132. One Sucret box containing miscellaneous tacks.
133. Numerous musical score books and technical pamphlets.
134. One wooden box containing Jap-Art Kolor Stix.
135. One piece of cardboard containing 3 blue thumbtacks.
136. Two Sucret boxes containing miscellaneous screws and washers.
137. One small piece of metal pipe.
138. One paper bound book "Murder on the Side".
139. One photograph of man with stick.
- (1120)
140. One yellow ancor clasp envelope with numerous papers inside.
141. One balance to 35 inch weights.
142. One pick & case.

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143. One map of "Loop" Chicago.
144. One package of 22 phonograph records.
145. Miscellaneous small tools.
146. One coil grey wire.
147. One coil blue wire.
148. One bundle three phonograph records.
149. One paper bound book "The Last Party."
150. One oil painting of refinery.
151. One small piece of wood glued together.
152. Six match boxes.
153. One red plastic object.
154. Notebooks, photographs, art sketch books, scientific magazines.
155. One picture postcard to "Goldfus from Gladys."
156. Three pieces of wood, each showing signs of having been glued together.
157. One piece of wood showing attempts to alter outer edge.
158. One piece of foam rubber glued together.
159. One Eveready flashlight battery.
160. One Bright Star Flashlight battery.
161. Sixty-four artists paint brushes and three pencils.
162. One plastic container having blue top.
163. One light metal container threaded inside with hole in bottom.

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164. One Speedgraphic camera #E88035.
165. One bottle Diethylene Oxide bearing #C-73132 from Amend Drug & Chemical Co..
166. Four magnagrips.
- (1121)
167. One Schneider-Krueznach lens.
168. One Gorez double anastigmatic lens.
169. One photograph of market which is overlined and one overliner.
170. One Premier Street map of Baltimore.
171. One Sinclair map of Long Island.
172. One Sinclair map of Westchester and Putnam Counties.
173. 13 sales and rent receipts.
174. One news clipping containing death notices on one side and notice of arrest on other.
175. One group of photographic paper.
176. One book entitled "Elements of Symbolic Logic."
177. One book "World-Famous Paintings."
178. One book mark Concord Books.
179. One book "Science News."
180. Miscellaneous items, photographic equipment, pencils, electronic tubes, match books covers, map, French dictionary.
181. Book "The Artists Handbook."
182. Paper bound book "Number, the Language of Science."

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183. Book "Installation and operations instructions for Model S-72 portable radio receiver."
184. Book "Degas."
185. Book "Silver for the Craftsman."
186. Book "Hands."
187. Book "Vuillard."
188. Book "Kaethe-Kollwitz."
189. Book "The Journey of Simon McKeever."
190. Book "The Continental."
191. Book "Goya to Gauguin" in cardboard box.
192. One group 16 photographs.
193. One hollowed out large nail.
- (1122)
194. One set headphones.
195. Miscellaneous items found on second shelf, matchbook, photographic equipment, bankbook.
196. One piece of wood 2 x 4 glued together.
197. Ten tacks and miscellaneous electrical equipment.
198. One Seth Thomas metronome.
199. Envelope containing sanding paper.
200. Envelope containing small pieces of plywood glued together.
201. Miscellaneous items found on bottom shelf of closet, maps, photographs, portraits and photograph equipment, brochures and books.
202. Miscellaneous papers containing writings and photographs.

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at 252 Fulton Street, Brooklyn, N. Y.*

This inventory was made in the presence of FREDERICK E. WILKITS and JOSEPH F. PHELAN. S. A. F. B. I.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

I also certify that, in the absence of the rental occupant at the time the search was made, I left a copy of the search warrant together with an inventory of the property seized in the premises described in the warrant and that I also sent by registered mail a copy of the search warrant together with an inventory of the property seized to Emil R. Goldfus,* on 7-1, 1957.

JOSEPH F. PHELAN S. A. F. B. I.

Subscribed and sworn to and returned before me this 1st day of July, 1957.

WALTER BRUCHHAUSEN
United States District Judge
E. D. N. Y.

* Also known as Martin Collins and Rudolph Ivanovich Abel, Immigration and Naturalization Detention Facilities, McAllen, Texas.

**Search Warrant of August 16, 1957, for Room 509
at 252 Fulton Street, Brooklyn, N. Y.**

Search Warrant.

(1135)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

IN THE MATTER

of

THE APPLICATION FOR SEARCH WARRANT
OF ROOM 509 ON THE 5TH FLOOR OF
THE BUILDING LOCATED AT 252 FUL-
TON STREET, BROOKLYN, NEW YORK,
RENTED AND UTILIZED BY EMIL R.
GOLDFUS, ALSO KNOWN AS MARTIN
COLLINS, ALSO KNOWN AS RUDOLF
IVANOVICH ABEL.

Search
Warrant.

EASTERN DISTRICT OF NEW YORK, ss:

TO ANY SPECIAL AGENT OF THE FEDERAL BUREAU OF INVESTIGATION OR ANY UNITED STATES MARSHAL:

Affidavit having been made before me by Edward H. Moody, Special Agent of the Federal Bureau of Investigation, (supported by the affidavit of David Levine) that he has reason to believe that on the premises known as Room 509 on the 5th floor of the building located at 252 Fulton Street, Brooklyn, New York, and within the Eastern District of New York, said Room 509 consisting of one room, there is now being concealed and secreted therein certain property, to wit, camera equipment, including microfilm and microdot equipment; and items which have been or are suitable to be fashioned into "containers" for the secreting and transmitting of microfilm, microdot and other secret

*Search Warrant of August 16, 1957, for Room 509
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messages; and tools with which to fashion such "containers"; and microfilm, microdot and other messages, including coded communications, which material is fitted and intended to be used in furtherance of a conspiracy to violate the provisions of 18 U. S. C. 793, 794 (1136) and 951, and an indictment having been returned on August 7, 1957 by a Grand Jury sitting in the Eastern District of New York against Rudolf Ivanovich Abel, also known as "Mark", also known as Martin Collins and Emil R. Goldfus, charging said person with a conspiracy to violate the provisions of 18 U. S. C. 793, 794 and 951, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises as above described,

You are hereby commanded to search the place named for the property specified; serving this warrant and making the search in the daytime, and if the property be found there to seize it. Prepare a written inventory of the property seized, return this warrant, and bring the property before me within ten days of this date, as required by law.

Date: Brooklyn, New York
August 16, 1957

EDWARD E. FAY
United States Commissioner
Eastern District of New York

Approved

CORNELIUS W. WICKERSHAM JR.
Acting U. S. Attorney
E. D. N. Y.

*Search Warrant of August 16, 1957, for Room 509
at 252 Fulton Street, Brooklyn, N. Y.*

Affidavit of Edward H. Moody for Search Warrant.

[SAME TITLE.]

(1137)

EASTERN DISTRICT OF NEW YORK, ss.:

Edward H. Moody, being duly sworn, deposes and says that he is a citizen of the United States, over the age of 21 years, and is a Special Agent of the Federal Bureau of Investigation, United States Department of Justice, and upon information and belief and upon the facts alleged in the affidavit accompanying this application, which affidavit has been executed by David Levine, and upon the facts alleged in an indictment returned on August 7, 1957, against Rudolf Ivanovich Abel, also known as Mark, also known as Martin Collins and Emil R. Goldfus by a Grand Jury sitting in the Eastern District of New York, and filed with the Clerk of the United States District Court in said district, alleges and charges as follows:

Your deponent has been a Special Agent of the Federal Bureau of Investigation for six years, during which time and in connection with his official duties, he has from time to time been assigned to the investigation of espionage violations and as a result thereof is familiar with the techniques and methods of operation utilized in the United States, and particularly in the Eastern District of New York, by foreign espionage agents, including espionage (1138) agents of the Union of Soviet Socialist Republics.

The above mentioned indictment alleges that Rudolf Ivanovich Abel, also known as "Mark", also known as Martin Collins and Emil R. Goldfus did unlawfully, wilfully and knowingly conspire and agree with various other persons named in the indictment to violate subsection (a) of Section 794, Title 18 United States Code and subsection (c) of Section 793, Title 18 United States Code. The indict-

*Search Warrant of August 16, 1957, for Room 509
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ment further charges that it was a part of said conspiracy that the defendant and certain of his co-conspirators would fashion "containers" from bolts, nails, coins, batteries, pencils, cuff links, earrings and the like, by hollowing out concealed chambers in such devices suitable to secret therein microfilm, microdot and other secret messages. It was further a part of said conspiracy that the defendant and his co-conspirators would communicate with each other by enclosing messages in said "containers".

On June 21, 1957 Emil R. Goldfus, also known as Martin Collins, also known as Rudolf Ivanovich Abel, was taken into custody by officers of the Immigration and Naturalization Service of the United States Department of Justice. Following the departure from the hotel of Emil R. Goldfus, also known as Martin Collins, also known as Rudolf Ivanovich Abel, in the custody of Immigration officers on June 21, 1957, the room which had been occupied by Goldfus was inspected by agents of the Federal Bureau of Investigation. This inspection revealed a small wooden pencil in a wastebasket. A careful examination of this pencil revealed it to be a container with a number of photographic frames of microfilm secreted therein with writing thereon.

(1139) From the foregoing, and from the accompanying affidavit of David Levine, and from the allegations set forth in the above-mentioned indictment against Rudolf Ivanovich Abel, also known as Martin Collins, also known as Emil R. Goldfus, your deponent has reason to believe and does believe that said Emil R. Goldfus, also known as Martin Collins, also known as Rudolf Ivanovich Abel, has, in the furtherance of the conspiracy alleged in the above-mentioned indictment, concealed in a storage room designated as Room 509 on the 5th floor of the building located at 252 Fulton Street, Brooklyn, New York, certain property, to wit, camera equipment, including microfilm and microdot equipment; and items which have been or are suitable to be

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at 252 Fulton Street, Brooklyn, N. Y.*

fashioned into "containers" for the secreting and transmitting of microfilm, microdot and other secret messages; various books, metal dies and tools of a small size and a one-third horsepower generator and numerous film containers; various items of clothing; and a tubular metal table stand and wooden work tables.

WHEREFORE, your deponent prays that a search warrant issue authorizing any Special Agent of the Federal Bureau of Investigation to enter, in the daytime, with proper assistance, Room 509 on the 5th floor of the building located at 252 Fulton Street, Brooklyn, New York, and there search for and seize and take into possession all of said articles or material found therein.

EDWARD H. MOODY

Sworn to and subscribed before me }
this 16 day of Aug., 1957. }

EDWARD E. FAY

U. S. Comm.

Eastern Dist. of New York

Affidavit of David Levine for Search Warrant.

[SAME TITLE]

(1140) EASTERN DISTRICT OF NEW YORK, ss.:

David Levine being duly sworn, deposes and says that he is a citizen of the United States, over 21 years of age, and is an artist renting a studio in the building located at 252 Fulton Street, Brooklyn, New York.

Your deponent is acquainted with Rudolf Ivanovich Abel and knew him by the name Emil R. Goldfus at the

*Search Warrant of August 16, 1957, for Room 509
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time Goldfus occupied a studio in the same building in which your deponent's studio is located. Your deponent and the said Emil R. Goldfus were co-tenants of a storeroom located at 252 Fulton Street on the 5th floor and designated as Room 509. Your deponent and Goldfus shared this storeroom and jointly contributed toward the rental of this space from about April of 1957 until about August 13, 1957.

Your deponent has had occasion to be in this storeroom and has observed various items of personal property which are known by him to be owned by Emil R. Goldfus, and which said Goldfus has stated are owned by him. The possessions of Emil R. Goldfus, which are at present in this storeroom, consist of approximately 20 pasteboard and wooden boxes of various sizes. These boxes have been observed by your deponent and he knows them to contain (1141) photographic equipment and supplies; various books, metal dies and tools of a small size; a one-third horsepower generator and numerous film containers; various items of clothing; and a tubular metal table stand and wooden work tables.

DAVID LEVINE

Sworn to and subscribed
before me this 16 day
of August, 1957.

EDWARD E. FAY
U. S. Commissioner
Eastern District of New York

*Search Warrant of August 16, 1957, for Room 509
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Return.

**UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
201 East 69th Street
New York, New York**

August 17, 1957

(1128)

I received the attached search warrant August 16th, 1957 and have executed it as follows:

On August 17, 1957 at 9:16 AM, I searched the premises described in the warrant and I left a copy of the warrant with Harry Mac Mullin, 252 Fulton Street, Brooklyn, New York together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. One Eico signal generator, #A-2877.
2. One box of Kodak Sheet Film.
3. One wire with two clamps.
4. One Kodak densitometer Model 1A.
5. One Greenfield Screw Plate. #A-1½.
6. One Round metal box containing screws.
7. Kodak Sheet film box, containing screws and gears.
8. Kodak Sheet film box, containing screws and negatives.
9. Red cardboard box containing screws.
10. One Lamp.
11. One black metal box appearing to be Photo cell.
12. One Kine Exakta Multiscope, with 6 canisters of film.

*Search Warrant of August 16, 1937, for Room 509
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13. Two keys.
14. One Ronson Cigarette lighter.
15. One box Dupont Defender film.
16. Three keys on ring.

(1129)

17. One Hand typed film editor with 35 mm. film attached.
18. One Etalom T-square type wrench in case.
19. One book entitled "Schwann".
20. Two wooden pencils.
21. One hard rubber tank containing various metal objects.
22. One box (wooden) 3" by 7" containing miscellaneous items including three tie clasps.
23. One hand blow torch (small).
24. One box of Kodachrome.
25. One box of Kodachrome unsealed.
26. One glass cutter.
27. One metal turning lathe, and accessories in wooden box.
28. One City map and tourist guide of Los Angeles, Calif.
29. One package of plastic pieces.
30. Six metallic film cannisters (sealed).
31. One Canon camera holder in leather case.
32. One metal film cannister.
33. One Sucrets box, containing nuts & bolts.
34. Two metallic film cannisters (sealed).
35. One set of Elson taps & dies.

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36. One box 3 $\frac{1}{4}$ by 4 $\frac{1}{2}$ entitled Screws, bolts, etc. to Easel.
37. One Cardboard box 1 $\frac{1}{2}$ by 2 ft. by $\frac{1}{2}$ ft. containing books.
38. One cardboard box containing a lathe & miscellaneous machine parts.
39. One roll gummed paper from William I. Meil, 1507 Walnut St., Philadelphia, Pa.
- (1130)
40. One Sucret box containing various screws & metal objects.
41. One Jacobs chucks box containing various metal objects.
42. One black loose-leaf notebook.
43. One box 8 by 10 inches containing various lenses and prisms.
44. One notebook 8 by 10 inches containing receipts & numerous notes.
45. One container Ansco color 35mm. film.
46. One long screw about 5 inches.
47. One cannister with several strips 35mm. film.
48. One Sucret box containing screws.
49. One Western Incident Light Adapter consisting of two parts.
50. One Sucret box containing screws.
51. One Zippo type lighter.
52. One cardboard box with red plastic tape containing screws.
53. One Lieca 35mm. printer.

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54. One solder and flux kit.
55. One Bietgen 1931 B-8 protractor.
56. One solid metallic circular object of same size.
57. One plastic box containing screws and metal objects.
58. One cardboard box marked separation negatives, containing various metal objects.
59. One set Henry & Allen tin shears.
60. One cardboard box 4 by 1 by 1½ inches containing screws & other metal objects.
61. Four ounces (two sheets) imported rabbit skin glue.
62. One red covered pencil.
- (1131)
63. Two packages Kodak Ekta chrome color film.
64. One plastic bottle containing gears in oil.
65. One box containing mirror 1½ by 1½ inches.
66. One plastic box 2 by 2 inches containing numerous small watch type parts.
67. One small coil of green wire.
68. One Simpson meter.
69. One Westinghouse Volt meter.
70. One package metal film mounts.
71. One book entitled "History" by V. Gordon Childe.
72. Two large glass magnifiers.
73. One bottle Phenylenediamine.
74. One bottle Acetoacet-yellow.
75. Small paper bag containing toggle switch and other metal objects.

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76. One ANW 250 instrument.
 77. One piece plain white paper with writing.
 78. Four tools, one 10 inch screw driver, one 12 inch file, one 10 inch square, one 6 inch file.
 79. One Electro-tech meter.
 80. One piece of graph paper with writing.
 81. One large magnifying glass.
 82. One box containing two pencils and Miscellaneous items.
 83. Miscellaneous papers found in rubber banded, two maps, photo and graph paper.
 84. One box of radio parts & tubes.
- (1132)
85. One 12 inch flexible curve rule.
 86. One box containing miscellaneous items; pen, pencil, nails, screws, film & radio parts.
 87. One cardboard box containing radio tubes.
 88. One cardboard box containing $\frac{1}{3}$ horsepower Atlas Motor & various items.
 89. One metal container containing radio parts & screws.
 90. Two metal bound magnifying glasses.
 91. One box containing radio parts, film containers, matches, screws, pencils.
 92. One Assembly Products Inc. meter.
 93. One box of miniature electronic tubes.
 94. One box containing Aristo Grid Light Enlarging Unit.
 95. One box of radio tubes & flash lamps.

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96. Four miscellaneous radio tubes, and two electronic circuits.
97. One cardboard box marked "Bending Jigs" containing metal objects.
98. One box of radio parts.
99. One box of glass jars containing photographic chemicals.
100. One Sucret box containing screws.
101. One book "How to Run a Lathe".
102. One box containing jars of chemicals. (Photograph)
103. Two jars of citric acid.
104. One jar Potass. Metabisulfite.
105. One box containing a motor & lathe parts:
(1133).
106. One package strip film.
107. One Aristo Enlarging unit for color model 5 x 7.
108. One jar Acid Pyrogallie.
109. One Photo Enlarger.
110. One Hagstrom map of New Jersey.
111. One Hagstrom map of 50 mile radius from New York.
112. One Hagstrom map of New York City.
113. One small black transformer.
114. One typewritten set of notes entitled "That You Cannot Mix Art And Politics."
115. One large slide rule.
116. One camera case containing camera Ser. #M-69121.
117. One photo enlarger.

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118. One box marked "Small motors, volt stabilizers and heavy electronics."
119. One Galab Timer.
120. One transformer.
121. One box of Eagle color pencils.
122. One three inch metal pipe.
123. One Diacro 12 inch Shears enclosed in wooden case.
124. One Diacro 12 inch Brake.
125. One black application for social security account number, found in suitcase. (Blue with brown trim)
126. One key.

(1134) This inventory was made in the presence of Francis P. Prior and John S. Mulhern SA FBI.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

I also certify that, in the absence of the rental occupant at the time the search was made, I left a copy of the search warrant together with an inventory of the property seized in the premises described in the warrant and that I also sent by registered mail a copy of the search warrant together with an inventory of the property seized to Rudolf Ivanovich Abel, aka: "Mark", aka: Martin Collins and Emil R. Goldfus, on August 17, 1957.

s/ EDWARD H. MOODY

Subscribed and sworn to and returned before me this
19th day of August, 1957.

EDWARD E. FAY
United States Commissioner
Eastern District of New York.

**Order to Show Cause Why Certain Portions of the
Indictment Should Not Be Stricken.**

[SAME TITLE.]

(1216) Upon the indictment herein, and all the pleadings and proceedings heretofore had herein, and the annexed affidavit of Arnold Guy Fraiman, duly sworn to on the 30th day of September, 1957, it is

ORDERED that The Honorable William F. Tompkins, Assistant Attorney General of the United States, show cause at a term of this Court, to be held in Room 323, at the United States Court House, 271 Washington Street, in the Borough of Brooklyn, City and State of New York, on the 2d day of October, 1957, at 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made herein, pursuant to Rule 7 (d) of the Federal Rules of Criminal Procedure, striking as surplusage the following matter from the indictment herein:

COUNT ONE.

All of Paragraph 10.

COUNT TWO.

All of Paragraph 10.

(1217) COUNT THREE.

All of Paragraph 1.

From Paragraph 2, the words "the Government of the Union of Soviet Socialist Republics," on lines 6 and 7.

From Paragraph 3, the words "and would, as such agents, obtain, collect, and receive information and material of a military, industrial and political nature, and as such agents would communicate and deliver said information and material to other co-conspirators for transmission

Order to Show Cause Why Certain Portions of the Indictment Should Not Be Stricken.

to the said Government of the Union of Soviet Socialist Republics."

From Paragraph 3, the words "and would receive and transmit the said information and material to the said Government of the Union of Soviet Socialist Republics."

From Paragraph 4, the words "for the purpose of obtaining, collecting, receiving, transmitting and communicating information and material of a military, commercial, industrial and political nature."

From Paragraph 5, the words "for the purpose of obtaining, collecting, receiving, transmitting and communicating information, material, messages and instructions on behalf and for the use and advantage of the said Government of the Union of Soviet Socialist Republics."; and it is

FURTHER ORDERED that service of a copy of this order and of the affidavit annexed hereto, on the said William F. Tomp- (1218) kins, Esq., on or before September 30, 1957, shall be sufficient service of this order.

Dated: September 30, 1957.

MORTIMER W. BYERS
United States District Judge.

**Affidavit of Arnold Guy Fraiman, in Support of
Order to Show Cause.**

[SAME TITLE.]

(1219)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ARNOLD GUY FRAIMAN, being duly sworn, deposes and says on information and belief:

He was assigned as associate trial counsel for Rudolf Ivanovich Abel, the defendant, by the Honorable Matthew T. Abruzzo on August 29, 1957.

The indictment herein, consisting of three counts, was filed on August 7, 1957, in the Eastern District of New York. A plea of not guilty to each count of the indictment was entered on defendant's behalf by Judge Abruzzo on August 9, 1957.

This affidavit is submitted in support of defendant's motion for an order to show cause why certain matter contained in the indictment herein should not be stricken as surplusage, pursuant to Rule 7(d) of the Federal Rules of Criminal Procedure.

Count One of the indictment charges a conspiracy to violate Section 794(a), Title 18, United States Code. This provision makes it a crime punishable by death, to transmit to a foreign government or its agents material relating to the national defense of the United States, with intent and reason to believe that such material is to be used to the advantage of the foreign government.

(1220) The first nine paragraphs of Count One describe how the defendant and his co-conspirators allegedly would carry out the conspiracy alleged therein. Paragraph 10, however, alleges that as part of the conspiracy to violate Section 794(a) the defendant and his co-conspirators would "in the event of war" (1) set up clandestine radio posts,

*Affidavit of Arnold Guy Fraiman, in Support of Order
to Show Cause.*

and (2) engage in acts of sabotage. Both of these acts were contingent upon the occurrence of war between the United States and Russia. This never came to pass during the period of the conspiracy's alleged existence, i.e., from 1948 to August 7, 1957.

Thus, paragraph 10 charges the defendant with conspiring to commit certain acts in the event of a contingency which never occurred. Such a conspiracy, if it in fact existed, is not a violation of law. In *United States v. Crafton, et al.*, 25 Fed. Cas. 681, No. 14881 (C. C. W. D. Mo. 1877), the court held that,

"However fraudulent in ulterior design, or morally reprehensible the acts charged in the indictment may be . . . (the conspiracy statute) . . . can not be extended to a case where the fraud which the conspiracy contemplated can only be effected in case an act of congress shall be thereafter passed of a nature to fit the prior conspiracy and give it something to feed upon" (p. 682).

Paragraph 10 of Count One should therefore be stricken as surplusage. That portion of paragraph 10 which relates to the commission of acts of sabotage should be stricken for still another reason: It does not come within the purview of a conspiracy to violate Section 794(a), and is accordingly irrelevant and immaterial. If the entire paragraph of [or] any portion of it were permitted to remain in the indictment, it would be highly prejudicial to the defendant.

Paragraph 10 of Count Two is identical to paragraph 10 of Count One and should be stricken as surplusage from that count for the same reasons as those advanced above.

Count Three of the indictment herein charges a (1221) conspiracy to violate Section 951 of Title 18, which makes it a crime for a person other than a diplomatic officer, to act in the United States as an agent of a foreign govern-

*Affidavit of Arnold Guy Fraiman, in Support of Order
to Show Cause.*

ment without prior notification to the Secretary of State. Paragraph 1 of Count Three, and the material contained in paragraphs 3, 4 and 5 which the defendant seeks to have stricken as surplusage, would be inadmissible on a trial of the indictment herein, on the ground that the material contained therein is irrelevant and immaterial to the proof of a conspiracy to violate Section 951, and is of a nature calculated to prejudice the defendant in the eyes of a jury. Accordingly, it should be stricken from the indictment.

With respect to paragraph 2 of Count Three, the words "the Government of the Union of Soviet Socialist Republics" should be stricken because that government is listed therein as a co-conspirator, and a government can not be so charged. C.f., *United States v. United Mine Workers of America*, 330 U. S. 258 (1947).

WHEREFORE, it is respectfully prayed that the motion of the defendant to strike certain portions of the indictment as surplusage be granted.

ARNOLD GUY FRAIMAN

Sworn to before me this
30th day of September, 1957. }

JEAN B. THOMSON
Notary Public, State of New York
No. 31-3975500
Qualified in New York County
Term Expires March 30, 1959

Memorandum Opinion on Motion to Strike.

(1239)

UNITED STATES OF AMERICA

v.

RUDOLF IVANOVICH ABEL, etc.

Crim. 45094.
October 3, 1957.

BYERS, D. J.:

Motion No. 3 of October 2, 1957:

Defendant's motion denied.

The only apparently serious question presented by the defendant has to do with Paragraph 2 in Count Three concerning the Government of the U. S. S. R.

I am unwilling to hold in effect as a matter of law that that Government could not have been a party to the alleged conspiracy as pleaded.

Settle order.

MORTIMER W. BYERS,
U. S. D. J.**Order on Motion to Strike.**

[SAME TITLE.]

(1253) This cause having come on to be heard on motion of the defendant to strike certain allegations from the indictment, on the ground that they are surplusage and prejudicial, and the court having heard the oral argument of Thomas M. Debevoise for the defendant, and Anthony R. Palermo for the Government, and being fully advised, it is

ORDERED, that the said motion be and it hereby is denied.

Dated: October 4, 1957.

MORTIMER W. BYERS,
United States District Judge.

Consented to:

Arnold G. Fraiman

Excerpts From the Transcript of the Trial.

MOTIONS AT OPENING OF TRIAL.

(1727) Mr. Donovan: May it please the Court, there (1728) has been pending in the United States District Court for the Southern District of New York an independent civil proceeding under Rule 41-E of the Federal Rules of Criminal Procedure for the suppression of certain evidence seized by the Government at the Hotel Latham, on June 21, 1957.

The Hotel Latham is in the Southern District.

This proceeding was heard by Judge Sylvester Ryan in that court on September 23, 1957.

Yesterday afternoon Judge Ryan handed down a decision in which he held: 1, that the action had been properly commenced in the Southern District of New York.

The Court: By the action, you mean the proceeding?

Mr. Donovan: Yes.

2, that the Court recognized the nature of the proceeding as an independent civil proceeding, but that in the exercise of its discretion the Court for the reasons stated in the opinion was dismissing the proceeding with leave for the petitioner to commence—

The Court: Who is the defendant in this cause?

(1729) Mr. Donovan: Who is the defendant in the cause, to make a similar application in this district.

The Court: By reason of the fact that the trial of the indictment is pending in this district, is that correct?

Mr. Donovan: It is, your Honor; but he had additional reasons, too.

Accordingly, in order to expedite this proceeding and to avoid any unnecessary delay, I ask that the Court accept a copy of all papers which was submitted by either the Government or Abel in that proceeding in the Southern District, that the Court accept such papers as originals in this proceeding and that the Court direct that they be filed and that the Court construe that all such papers as a motion in this proceeding by the defendant under Rule 41-E for the suppression of such evidence.

Motions.

The Court: And the United States does not object to the Court's taking the motion under advisement by reason of the fact that the notice is simply an oral notice given at this time?

Mr. Tompkins: That is correct, your (1730) Honor.

The Court: The Court will accept the papers and the Court will entertain the motion as though it had originally been made in this Court.

Mr. Donovan: Thank you.

The Court: I think that covers what you have in mind.

Mr. Donovan: I think so, your Honor.

Mr. Fraiman: Do I understand that you are reserving decision on our motion to suppress the evidence at this time?

The Court: Oh, yes. I want to study the papers here.

The decision on the motion is reserved.

Mr. Tompkins: There is only one thing that the Government will want to put into the record before the jury is called, and that is, there has been compliance with Rule 10 in furnishing the defendant with a copy of the indictment prior to the pleading and that the defense is satisfied that 18 U. S. C. 34, 32, on the list of veniremen and the list of witnesses has been satisfactorily complied with.

Mr. Donovan: That is correct.

Mr. Tompkins: And the Government would further like to state for the record that the witness Reino Hayhanen was made available to counsel for the defense on Saturday, September 28, 1957; at which time counsel for the defense was permitted to interview him without anyone else being present.

The Court: And did so interview him?

Mr. Tompkins: And did so interview him.

Mr. Fraiman: We should like to state for the record, however, that the individual whom we interviewed refused to talk to us.

Mr. Maroney: This is a supplemental list which was served a few days ago on defense counsel and it previously was served.

Motions.

We have been holding it.

We would like it to be filed with the Court just as a matter of record.

Mr. Fraiman: With respect to the supplemental list of witnesses which were furnished to the defense on Tuesday of this week, —

The Court: October 1st?

Mr. Fraiman: October 1st, and therefore less than the three days required by statute, the defense waives any objections it has under the statute (1732) providing for the three days on notice upon the representation by the Government that the witnesses who were furnished were relatively unimportant witnesses, whose testimony would take up very short time in the course of the trial.

Mr. Maroney: The witnesses are technical witnesses whose testimony would not consume five or ten minutes.

Mr. Tompkins: I think all of the witnesses could be dispensed with, your Honor, and that is the reason of my term, satisfactorily complied with, because it was my understanding with the defense.

Mr. Fraiman: It is with that understanding.

The Court: Have you covered the ground?

Mr. Fraiman: We have several additional motions that we would like to make before the jury is impaneled.

First, we move to dismiss the indictment on the ground that tainted evidence was presented to the Grand Jury insofar as evidence obtained through an illegal search and seizure at the Hotel Latham on June 21, 1957, was presented to the Grand Jury as well as evidence that was obtained as a result (1733) of leads gathered from the search of the Hotel Latham on June 21.

The Court: That is your first motion?

Mr. Fraiman: Yes.

The Court: Decision reserved.

Mr. Fraiman: Defendant also moves to suppress all evidence obtained through leads gathered at the search of the Hotel Latham on June 21st, that is to suppress evidence from being introduced in the course of this trial which was

Motions.

obtained through leads that were gathered at the Hotel Latham.

The Court: Are you still on the same point?

Mr. Fraiman: Yes, your Honor.

Further, to suppress the testimony of any witness who was, who came to the attention of the Government as a result of leads obtained in the course of the search of the Hotel Latham on June 21st.

The Court: Decision reserved.

Mr. Fraiman: Those are the motions, your Honor, at this time.

The Court: Are we ready now to proceed?

Mr. Fraiman: One more request, your Honor.

We have to get all these out of the way.

The Court: That is the way to do it.

(1734) Mr. Fraiman: At this time, your Honor, the defense requests that we be furnished with all investigative materials that the Government has concerning the panel of jurors who are about to be selected, that is, any notes or information in possession of the Government concerning the prospective jury panel which they have obtained as a result of their investigation on the ground that this is not related to the evidence of the Government, but is material that is equally important to the defense as well as to the Government.

We therefore feel that we are entitled to any such material the Government has in its possession.

Mr. Tompkins: If your Honor please, counsel has said Government's investigation of the panel.

I would like to have him elaborate on that.

What investigation that he knows that the Government made of this panel is what I would like to know.

That is a pretty serious allegation.

Mr. Fraiman: As a former Assistant United States Attorney, I am aware of the practice of the Government in conducting what is commonly known as a name check of all prospective jurors.

Motions.

(1735) I see nothing derogatory in making my statement. It is a perfectly permissible procedure to follow.

My only request is that it be equally made available to the defense as well as the Government.

If Mr. Tompkins assures us that no such check was made of the jury, then the request will be withdrawn.

Mr. Tompkins: I don't intend to show counsel anything that is in the Government's files.

If the Government has anything in its files, it is entitled to use it. I thought that Mr. Fraiman might be indicating that the panel had been investigated.

That, of course, is not true, and I think he will agree with me; but if there is information relating to any individual in our files, I think the Government is entitled to use it and I don't think it has to make any of its files available.

The Court: Under what provision of the Rules do you make this motion?

Mr. Fraiman: The motion is not made under any specific provision of the rules.

(1736) The Court: Any statute?

Mr. Fraiman: No, your Honor, merely in the interests of fairness, the jury is to sit impartially. Any information that the Government has will enable them to select a jury that will be most favorable to the Government.

The Court: You have a list of the veniremen, to my knowledge, since I think, the 16th of September, isn't that so?

Mr. Fraiman: Approximately that date.

Mr. Tompkins: Yes.

The Court: 16 or 19?

Mr. Fraiman: I think it is the 19th.

The Court: You had just the same opportunity to investigate as the Government had, I think.

Unless you can show me some authority for the granting of the motion, I shall deny it.

Reino Hayhanen, for Government—Direct.

(27) REINO HAYHANEN, a witness called in behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Tompkins:

Q. Will you speak up, so that your voice is heard all the way back here to the last jurymen, please?

Now, what was your last permanent address in the United States? A. Peekskill, New York State.

Q. You are a citizen of Russia, is that correct? A. Yes, I am.

Q. And from 1939 roughly until 1957 you were employed by the Soviet Union?

Mr. Fraiman: If your Honor please, at (28) this stage I object to Mr. Tompkins leading the witness.

The Court: Who is going to conduct the trial for the defense, please?

Mr. Tompkins: I would like to know that too, please.

The Court: I understood that Mr. Donovan is the chief counsel.

Mr. Fraiman: Yes.

The Court: Are you to conduct the trial, Mr. Donovan?

Mr. Donovan: I intend to, on the other hand Mr. Fraiman was also assigned because of him being a former assistant United States attorney.

The Court: You make the objections.

What is the objection?

Mr. Fraiman: The objection is—

The Court: Will you allow Mr. Donovan to do the talking, please?

Mr. Donovan: I believe, your Honor, that Mr. Fraiman's objection was that Mr. Tompkins was leading the witness.

The Court: Now, what is your objection?

(29) Mr. Donovan: I make the same objection.

Reino Hayhanen, for Government—Direct.

The Court: I don't think it is harmful leading thus far.

Overruled.

Mr. Tompkins: Will you repeat the question, please?

(The court reporter thereupon read the last question.)

Q. Is that correct? A. Yes, it is.

The Court: Can we adopt at the outset the formula, U. S. S. R.?

Mr. Tompkins: I guess we can.

The Court: I think that will simplify matters.

Q. Now, would you please describe your employment, briefly? A. Do I have to tell before espionage and counter-espionage work or just that one—

Q. No. I am getting at what agency in the Government of the U. S. S. R. were you employed by? A. The last time I was employed with the K. G. B. It means espionage work.

The Court: Is that K. G. B.?

(30) The Witness: Yes, that is Committee of State Security.

The Court: Are you speaking now of the period from 1939 to 1957, when you say that that was your employment?

The Witness: That is right, but, your Honor, up to 1948 I was working in N. K. G. B. It means counter-espionage work in Russia.

The Court: N. K. G. B.?

Mr. Tompkins: N. K. G. B., your Honor.

Q. Now, would your original employment with the N. B. G. D.— A. No, N. K. G. B.

Reino Hayhanen, for Government—Direct.

Q. Did it subsequently change its name? A. It was N. G. V. D.; then when N. K. V. D. was divided to N. K. V. D. and N. K. G. B., I was still working in N. K. G. B. section.

Q. Mr. Hayhanen, when did you first enter the United States? A. In October, 1952.

Q. And did you have a passport? A. Yes, I did.

Q. What was the name on that passport? A. Eugene Nicoli Maki.

(31) Mr. Tompkins: Will you mark this for identification, please?

(Mr. Tompkins hands to the clerk a passport book.)

Q. I have here, Mr. Hayhanen, Government's Exhibit 1 for identification. Can you tell us what that is? A. This is my first passport, what I got in Finland, what I was using to come to this country.

Q. In 1952? A. That is right.

Mr. Tompkins: The Government would like to offer this in evidence at this time.

(Mr. Tompkins exhibited the passport book to the defense counsel.)

Mr. Donovan: Your Honor, as I understand it, this is being offered in evidence subject to connection to the conspiracy?

The Court: I didn't hear that stated, but I assume that is so.

Mr. Donovan: This is being offered subject to later connection with the conspiracy?

Mr. Tompkins: That is correct.

Mr. Donovan: We have no objection at (32) this time, your Honor.

The Clerk: Exhibit 1 in evidence.

(Passport book was then marked Government's Exhibit 1 in evidence.)

Reino Hayhanen, for Government—Direct.

Q. Mr. Hayhanen, did you enter the United States in 1952?

The Court: May I look at that for a moment, please?

(The clerk then handed Government's Exhibit 1 in evidence to the Court.)

The Court: I suppose at some time you are going to ask the witness if in 1952 his name was Maki?

Mr. Tompkins: We will connect it up, your Honor; these are just general questions and we will go into more detail later on.

The Court: All right.

Q. Did you enter the United States in 1952 in connection with your employment by the Government of the U. S. S. R.?

A. That is right, I did.

Q. And in what capacity? A. I came to the United States as the United States Citizen.

(33) Q. The United States citizen? A. That is right.

Q. What were your duties in behalf of the Russian government in this country? A. I was sent to this country to be resident assistant in espionage work.

Q. Now, do you know the name of the resident officer?

A. I know him just by the nickname, Mark.

Q. Do you know him by any other name? A. No, I don't. I didn't know him by other name. I know him just for security reasons by his nickname.

Q. Now, do you see him in the courtroom here? A. Yes, I do.

Q. Would you please point him out? A. Yes. He is sitting there at the end of that table (indicating).

Q. The end of the table? A. That is right.

Mr. Tompkins: Will the defendant stand up, please?

(The defendant thereupon stood up.)

Reino Hayhanen, for Government—Direct.

(34) Q. Is that the gentleman? A. Yes.

Mr. Tompkins: I would like the record to note that the witness has identified the resident officer, Mark, Rudolph I. Abel.

The Court: Is there any questions that the witness identifies the defendant?

Mr. Donovan: No, your Honor.

Q. Now, do you know what his occupation is? A. He told me that he worked as a photographer, that he had somewhere a photo studio.

Q. Do you know whether he is an employee of the Russian government? A. Yes, he was—or he was up to this time.

Q. And, what agency of the government, if you know, was he employed by?

The Court: By the Russian government, do you mean the U. S. S. R.?

Mr. Tompkins: I beg your pardon, your Honor, the U. S. S. R.

A. Yes. He was employed by K. G. B.

Q. Did he have any rank? A. Yes, he had the rank of colonel.

Q. Now, when did you first meet Mark? (35) A. I met him in 1954, the first time.

Q. The first time? A. Yes.

Q. And you saw him, did you see him subsequently? A. Yes, then I was meeting him mostly once or twice a week.

Q. When did you last see him before today? A. The last I saw this year, February, middle of February.

Q. 1957? A. That is right.

Q. Now, Mr. Hayhanen, I want to ask you to answer some specific questions more in detail.

Where were you born? A. I was born in Russia, it is about twenty-five miles from Leningrad in a village, Kaskisarri.

Q. What was the date of your birth? A. 14th of May.

Reino Hayhanen, for Government—Direct.

Q. What year? A. 1920.

Q. Were you educated in Russia? A. Yes, I was.

Q. Will you tell us about your education? A. I finished in Russia teacher's college.

Q. That was your highest education? (36) A. That is right.

Q. Teacher's college? A. Yes.

Q. Did you thereafter teach school? A. Yes, I was teaching just about three months and then I was drafted to N. K. V. D. in 1939.

Q. Now, at that time was the N. K. V. D. a part of the army? A. No, it was like secret police, N. K. V. D. Was at that time militia and N. K. G. B., they were together, and after that they been divided N. K. V. D. was divided to N. K. V. D. and N. K. G. B.

Q. Now, when you were drafted in November, 1939, what branch of the N. K. V. D. were you assigned to? A. I was assigned as interpreter to operations group on Finnish territory, what was occupied, work by the Russian troops, to the Finnish-Russian War in 1939.

Q. Do you speak Finnish? A. Yes, I do.

Q. What were your duties in connection with this first assignment? A. My duties were that I had to work as interpreter while questioning by—when N. K. V. D. (37) officials been questioning some war prisoners.

Q. Now, when you were first drafted in the N. K. V. D., did you receive any training? A. I got just short course of training. It was about ten days course.

Q. What did the course consist of, just generally and briefly? A. We got several lectures during that nine or ten day period. How to question war prisoners, how to try to find that maybe there is somebody who is a spy to send as a war prisoner and then also we got short training as for future N. K. V. D. officials or workers, how to work on counter-espionage work, how to find anti-Soviet people, or some espionage agents from some other countries on Russian territory.

Reino Hayhanen, for Government—Direct.

Q. Now, after your first assignment which I believe you said was that of an interpreter in the N. K. V. D.—A. Yes, that is right.

Q. What did you next do? A. Then, after Finnish-Russian war ended I was sent to Karelia for N. K. V. D. work.

Q. Were your duties much the same as your (37-A) previous assignment? A. Yes, I was working as interpreter and I was working as N. K. V. D. official, too.

(38) Q. Now, after that assignment was completed, what did you do? A. That assignment was completed 1948 and I was called to Moscow.

Q. Well, now, do I understand this, from roughly, is it your testimony, that from roughly 1939 to 1948 you were working for the N. K. V. D.? A. That is right.

Q. Or successor organizations? A. Yes.

Q. And the general work that you have described to me or to the Court and the Jury? A. Right, it was N. K. V. D. or when N. K. V. D. was divided it was N. K. G. B.

Q. In other words, during the period 1939 to 1948 the name changed from N. K. V. D. to N. K. G. B. to K. G. B.?

A. That is right, because N. K. V. D. was divided.

Q. Now, during that period did N. K. V. D.—strike that.

During that period did the N. K. V. D. become a part of the Army? A. It didn't become a part of the Army, but we got Army ranks in N. K. V. D.

Q. Now, during that period between 1939 and 1948 (39) did you join the Communist Party of Russia? A. Yes, I did.

Q. Will you tell us about that? What year? A. 1942, from April, 1942 up to May, 1943 I was candidate to membership of Communist Party and since May, 1943, I was Communist Party member.

Q. Now, going up to the year 1948 what was your rank in the Security Service? A. 1948?

Q. 1948. A. 1948 I was first lieutenant.

Q. First lieutenant? A. Yes.

Reino Hayhanen, for Government—Direct.

Q. Now, in the summer of 1948 were you summoned to Moscow? A. Yes, I was called to Moscow and in Moscow—

Q. Well, will you tell us for what reason, if you know, and what happened? A. In Moscow my bosses explained to me that now they need me instead of counter-espionage work on espionage work.

Q. Mr. Hayhanen, when you went to Moscow, who did you see? A. When I came to Moscow and from personal office, I was (40) taken to P. G. U. or at that time Espionage Office.

I met my boss during Finnish Russian War in 1939, Major-General Baryshnikov.

Q. Now, at that time what was his position, if you know? A. I don't know exactly what his position was because I heard later that he was in one of East European countries for special mission and he came recently back.

Q. Was he one of the people that summoned you back? Is he one of your superiors who summoned you back? A. Yes, he was, and he explained himself that when they needed someone who can talk Finnish, he remembered that during 1939 and 1940, the Finnish War, he had in his operation group several Finnish—

Mr. Donovan: May I ask that his answer be stricken from the record as hearsay?

The Court: You don't think that it is binding on the defense, do you, Mr. Tompkins?

Mr. Tompkins: No, your Honor.

The Court: You consent it to be stricken?

Mr. Tompkins: I consent it to be stricken.

Q. Now, as I understand it you were summoned back to Moscow and you saw General Baryshnikov? A. That is right.

(41) Q. Who else did you see, if anybody, at that time? A. Then I saw Major Abramov and his bosses, Colonel—

Reino Hayhanen, for Government—Direct.

I cannot remember his name, and Lieutenant-Colonel, his assistant, Akmedov.

The Court: How is that spelled?

Mr. Tompkins: A-K-M-E-D-O-V, your Honor.

Q. Now, you do not remember the name of the colonel?
A. No, I cannot recall his name right now.

Q. Well, do you know what his position was? A. He was like I later—next year 1939—knew he was boss of American Division for Espionage Work in Russia.

Q. Now, do you know to what division Abramov was attached? Or what his position was? A. Abramov was instructor in the same division where Akmedov was his boss-assistant.

Q. In other words, are you speaking of the American Division of the P. G. U.? A. Yes, sir.

The Court: Is that P. G. U.?

Mr. Tompkins: P. G. U., your Honor.

The Court: Are we to be entitled to know what that stands for?

Mr. Tompkins: I will ask the witness that question, sir.

(42) Q. Will you tell us what the P. G. U. stands for?
A. P. G. U., it means, First General Division of—to translate it in English, First General Division. It was P. G. U. of N. K. G. B. or 1948 it was M. G. B., it means Ministry of State Security, M. G. B.

Q. In other words, as I understand it, this would be the First Division of the M. G. B.? A. That is right, First Division means that First Division was conducting all espionage work.

Q. Now, did you have any other meetings with any of the individuals you just mentioned on this trip to Moscow?
A. Yes, I did. Then, later, the same year when I was transferred to Esthonia, from P. G. U. to Esthonia came Abramov.

Reino Hayhanen, for Government—Direct.

Q. Before you were transferred to Esthonia and on this first meeting, did you meet a Colonel Korotkov? A. Yes, I met.

Q. Will you tell us the circumstances—

The Court: What was that name, please?

Mr. Tompkins: Korotkov, K-O-R-O-T-K-O-V.

The Court: All right.

A. Korotkov was the assistant boss of P. G. U.

Q. And you met him at the time that you made this (43) trip to Moscow when you were recalled back? A. Yes.

Q. Now, how long did you stay in Moscow on this trip?

A. The first trip I stayed over there about two and a half days.

Q. Now, were you advised of a change in assignment?

A. Yes, they told that they need me now on espionage work because they can use me more on espionage work, so that I can use my knowledge of Finnish—

Mr. Donovan: Your Honor, again I object on the ground that it is hearsay.

The Court: Well, I think Mr. Tompkins will agree that that is hearsay.

Mr. Tompkins: Yes.

The Court: Do you wish it stricken?

Mr. Donovan: Yes, your Honor.

The Court: So ordered.

Q. Now, as a result of your visit, I don't want the conversations of any of those who participated, but as a result of your visit was your assignment changed from counter-espionage to espionage? A. That is right.

(44) Q. Now, after your visit in Moscow where did you go? Did you return home? A. I returned to Karelia, and I prepared everything for moving from Karelia to Esthonia.

Q. Well, now—did you say Pardeni? A. Pardeni, it is in Karelia. I cannot remember how it is in English. It means that one part of Karelia and it was that capital of—

Reino Hayhanen, for Government—Direct.

Q. Now—

The Court: Capital of what?

The Witness: Raionni.

The Court: Is that a republic?

The Witness: Karelia is republic, but it is part of republic. It is a district. I cannot remember exactly how it is in English.

Q. Now, you left there, did you say, and you went to Esthonia? A. In 1948.

Q. Now, did you go to Esthonia upon orders from the M. G. B.? A. Yes, from Moscow.

Mr. Donovan: Your Honor, haven't we reached a point where we are entitled to instructions that the Government can't lead the witness?

(45) In other words—

The Court: I don't think that is harmful leading. That is simply saving time.

Mr. Tompkins: This is really just background.

Q. Now, what did you do in Esthonia? A. In Esthonia I was assigned to First Unit of M. G. B. It means for espionage unit work for a while during training to go to Finland.

Q. Now, were you instructed to contact any officer in charge in Esthonia? A. Yes, sir.

The Court: I think that means were you asked to speak to anybody?

Mr. Tompkins: I beg your pardon, your Honor.

Q. Were you asked to communicate with the officer in charge in Esthonia? A. Yes, when I left Moscow on that first trip, I was told that I have to communicate with assistant minister of M. G. B. in Esthonia, Colonel Pastelnyak.

Reino Hayhanen, for Government—Direct.

The Court: That is a fact, that isn't a conversation.

Mr. Donovan: I didn't hear you.

The Court: I say, he is testifying to a fact and not a conversation.

(46) Q. Will you spell that name? A. P-A-S-T-E-L-N-Y-A-K.

Q. Now, about that time what was your rank? A. 1948—1949 I got rank of Major.

Q. Now, what work did you do in Esthonia? A. In Esthonia mostly I was getting training for espionage work.

Q. Will you tell us what training you received? A. I received training on photography, then on driving car and how to make some repairs in cars, to show I can work as a car mechanic, auto mechanic.

(47) Q. Now, can you tell us specifically your training in photography? You mentioned photography, I believe. A. In photography, I got training as all photographers were getting, I was getting training on how to copy some documents or how to make some copies from some photos, and then I got some training of using Minox cameras.

Q. Will you spell that? A. M-I-N-O-X, cameras.

Q. Now, did you receive any other training in anything else while you were in Esthonia? A. I got training in to talk English, to write English.

Q. Now, how often did you take English lessons? A. English lessons I was getting about once or twice a week.

Q. Now, while you were in Esthonia, did you find the location of your future assignment in espionage work?

A. Yes, when, from Moscow came Major Abramov to visit me in Esthonia. He explained that—

Mr. Donovan: I object, your Honor.

Mr. Tompkins: Your Honor, the witness is testifying about a conversation with a co-conspirator, a co-actor, not named co-conspirator, but a co-actor

Reino Hayhanen, for Government—Direct:

who has been in this conspiracy from the original conversation and the meeting back in 1948 when the witness first went to Moscow.

The Court: Does it appear in the record that Abramov is one of the unnamed co-conspirators?

Mr. Tompkins: It doesn't appear in the record.

Mr. Donovan: I never heard of him before, your Honor, and I submit that there has been no proof of the conspiracy in the case to date.

Mr. Tompkins: We are not going to prove the conspiracy in the first hour with this witness, as your Honor well knows.

The Court: Yes, of course, but presently is the conversation between the witness and Abramov admissible against the defendant, and if so, on what theory?

Mr. Tompkins: Well, it certainly wouldn't be admissible unless it is connected up with the conspiracy, your Honor.

The position of the Government is that Abramov is a co-actor, in fact, a co-conspirator despite the fact that he is not named in the indictment.

Mr. Donovan: I respectfully submit that it is not binding.

Mr. Tompkins: I will withdraw the question, if your Honor please.

(49) What was the question prior to that?

(The court reporter thereupon read the last question.)

Q. Will you answer that yes or no? A. Yes, I did.

Q. What was that location? A. The location was the United States of America.

Q. Now, at that time that you were in Esthonia, did you receive information concerning a legend for yourself?

A. Yes, I did.

Reino Hayhanen, for Government—Direct.

Q. Will you tell us about that, please? A. At that time I got—

Q. Excuse me, I will withdraw that question.

Will you explain what a legend is, first? A. A legend is that for somebody who has to live another life by another name, that has to show himself for another person as he is.

Q. Now, in connection with the legend that you learned of in Esthonia, what was done concerning that? A. When Abramov came to Esthonia and explained that I have to go to the United States of America for espionage work, then beginning of 1949 I was called second time to Moscow and there picked up legend for Eugene Nicoli Maki, (50) who really was born in this country and which his parents went to Russia in 1927.

Mr. Donovan: I respectfully object, your Honor.

Mr. Tompkins: All the witness is testifying to—

Mr. Donovan: He has no personal knowledge of these facts, has he?

Mr. Tompkins: The witness is testifying—

The Court: I think this illuminates the United States Exhibit 1, doesn't it?

Mr. Donovan: Your Honor, he has no personal knowledge of what he has just stated, that is, that there originally was such a person as Eugene Maki.

The Court: He can state what he was told on that subject.

Mr. Donovan: It appears to me, your Honor, that what he has told is hearsay.

The Court: I think that the witness is entitled to explain his connection with Exhibit No. 1. I think that is the fundamental consideration.

Q. Mr. Hayhanen, have you ever seen a birth certificate for Eugene Nicoli Maki? A. Yes.

Q. Where? (51) A. I saw it in Moscow and then copy of birth certificate I got from Idaho, United States of America.

Reino Hayhanen, for Government—Direct.

Q. In other words, you saw two different ones, is that it?
A. Yes.

Q. Well, one in Moscow and one in Finland? A. Yes, and in—one in America, too, because in America for church registry I asked for one more copy.

Q. In other words, you wrote and obtained one? A. Yes, I obtained two copies, and I got one real birth certificate in Moscow, but they told that I cannot use it.

Q. Now, did you receive any further training when you came back to Moscow this second time? A. Yes, I received some more training.

Q. I beg your pardon; I think when you were describing the legend we were interrupted.

Will you, if you can recall, where Mr. Donovan objected, I think you were telling what the legend was, what it was for.

Will you go on with that explanation? A. Legend for me was that from the day when I would go to Finland I would have to live the life by the name Eugene Nicoli Maki. I did it since 1949.

(52) Q. Did I understand you to say that you went from Moscow to Finland? A. Yes.

Q. How did you travel to Finland? Will you describe that trip? A. From Moscow I went to Esthonia and from Esthonia I went by boat to Porkkala, was Finnish territory, but occupied by Russians, they paid rent for that occupying of that territory.

Q. And from Porkkala where did you go? A. From Porkkala then Russian espionage officials took me to Finnish Territory to Helsinki.

(53) Q. How did you make that trip? A. We made that trip in the car, and while they have been crossing that border I was in car trunk.

Q. In car trunk? A. Yes. In trunk of the car.

Q. Now, who was with you when you went across the border? A. With me was Major Vorobyev. He was working in Helsinki in newspaper, attache office, in Tass office.

Q. Tass? A. That's right.

Reino Hayhanen, for Government—Direct.

Q. Was there anybody else with you when you crossed the border? A. There was one more man and driver, but I don't know their names.

Q. All right.

Now, what did you do in Finland? A. In Finland I was building my background for that legend.

Q. All right, will you— A. It means that I had to show that really I was in Finland since 1943 instead of 1949.

I had to find some people who can tell if necessary that they meet me or I lived with them since 1943.

(54) Q. Would you tell us how you went about establishing the legend? What did you do? A. To establish that legend, I lived about three months in Lapland, in northern part of Finland, and over there I found two people who have been willing to testify if necessary that I lived over there during the war.

Q. What years would that be? A. Since 1943 up to 1948 because in 1948 then I moved to one blacksmith.

Q. I beg your pardon? A. Blacksmith.

Q. Blacksmith? A. Yes, repair man, and I lived over there, I worked over there for a while just to show some kind of connection that I really was working in Lapland; and then I moved to southern part of Finland. It was 1950.

Q. You mentioned seeing some people who would then say that you had lived there, is that right? A. Yes.

Q. Did I understand your testimony? A. Yes.

Q. Did you pay them any money? A. Yes, I did.

Q. How much? (55) A. To one I paid fifteen thousand Finnish marks; to another one twenty thousand Finnish marks.

Q. Was that your own money? A. No.

Q. Whose was it? A. I got that money from Moscow. Vorobyev gave me that money.

The Court: Who was it that gave you that money?

Reino Hayhanen, for Government—Direct.

Mr. Tompkins: Vorobyev. V-O-R-O-B-Y-E-V.

The Court: Will you do that once more?

Mr. Tompkins: V-O-R-O-B-Y-E-V.

The Court: Have we encountered him thus far?

Mr. Tompkins: He was the official that transported the witness over the border in the trunk of the car, sir.

The Court: Oh, I had the first initial of that B, and not V.

Do you make it V or B, which is the second letter of the alphabet?

Mr. Tompkins: It is V.

The Court: V as very?

Mr. Tompkins: V-O-R. V as in very.

The Court: Thank you.

By Mr. Tompkins:

(56) Q: Now, I believe you testified that you worked in 1949 and 1950 as a blacksmith? A. No. I was his—like—

Q. A helper? A. His helper.

Q. Now, after that employment what did you do? A. Then, when I moved to Tampere—that is Finnish town—I was working on factory.

Q. What kind of work was that? A. It was safe factory. They have been building safes and automobile body work they have been doing, repair works.

Q. Was this all done as a part of your legend? A. Yes, it was just to show that I am earning money by working on some other place, but not on espionage work.

Q. Now, after you had finished that work, what did you do? A. Then, from Tampere, I moved to Turku; and when I lived in Turku after 1952 I applied for American passport, when my Moscow bosses, they have been certain that my background is well built, that it is now to apply for United States Passport.

Reino Hayhanen, for Government—Direct.

Q. Now, while you were in Finland working at these various jobs, did you undergo any further training? A. During Finland?

(57) Q. During the time that you were in Finland establishing the legend, did you undergo any further training? A. In Finland I met several times Vorobyev, but the main thing what I was having in Finland was studying English.

Q. Studying English? A. Yes.

Q. Any other training? A. Not in Finland.

Q. Will you tell us how you applied for the passport, just what you did? A. I applied first from Idaho, United States of America, a copy of birth certificate.

Then I went to a Red—to American Legation in Finland, in Helsinki.

Q. What birth certificate did you write for in Idaho?

A. For Eugene Nicoli Maki.

Q. Then, as I understand you, you say you went to the American Embassy? A. That's right.

Q. Will you tell us what you did? A. Then over there, they asked me how long I was in Finland.

(58) And I explained by the legend that since 1943, and then they asked me to get some more papers that I never was serving in the Army, especially Finnish Army, that I never vote in Finland; so I did.

I got those papers and by those papers I got American passport for coming to the United States.

Q. Now, after you received this American passport, and that is the same passport which you have previously identified— A. That's right.

The Court: Government's Exhibit 1.

Mr. Tompkins: Government's Exhibit 1 is right.

By Mr. Tompkins:

Q. Now, did you return to Moscow? A. Yes. I was called to Moscow in August, 1952.

Reino Hayhanen, for Government—Direct.

Q. How did you return to Moscow? A. I returned to Moscow by the train from Porkkala territory to Leningrad and from Leningrad to Moscow.

Q. How did you cross the border? A. I crossed the border the same way like I came from Finland, in the trunk of the car.

Q. When you arrived in Moscow what did you do? A. When I arrived to Moscow I met my bosses and I got new instructions, written instructions, what I have to do (59) in the United States.

Q. Now, how long were you in Moscow on this trip? A. I cannot remember exactly date when I came to Moscow, but it was second part of August and I left—

Q. I don't want— A. —Moscow—

Q. —the exact date. A. —the third of September, 1952.

Q. Would you say that would make it about— A. About three—about three weeks.

Q. —about three weeks.

Now, did you receive any training on this trip? A. Yes, I did:

Q. Would you tell us what training you received, please? A. I got more training in photography, especially in making microdots, then in making soft film, then I got—

The Court: Making what?

Mr. Tompkins: Soft film.

The Witness: Soft film.

The Court: S-O-F-T?

Mr. Tompkins: S-O-F-T, yes, your Honor.

The Witness: Then I got code—how to cipher and decipher some secret messages.

(60) By Mr. Tompkins:

Q. Where were you given those instructions, do you recall? A. In Moscow, but I don't know that address. It was some private address.

The Court: It was?

(Answer read.)

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. In other words, it wasn't in a government building?

A. No.

Q. It was in a private home? A. That's right.

Q. Did you receive a code name while you were there?

A. Yes. I got another code name.

In Finland, I was by another code name, and they told, because I am leaving Finland and the United States, I have to use a code name Vik.

Q. Vik. V-I-K or C? A. K.

Q. V-I-K.

Now, while you were in Moscow did you see any containers? A. Yes, I saw some containers and I got training how to (61) hide some messages in those containers and how to use those containers.

Q. Will you describe the containers just roughly? What kind of containers were they? A. The containers, they are that kind of some hollow thing where you can hide some soft film or usual film; suppose coins made from two coins, one coin and you can open it a special way, and to put message over there and to close it; or some bolts, screws, match books or some magazines.

Q. All right.

Now, on this trip to Moscow, did you meet Pavlov? A. Yes, I did.

Q. Will you tell us about that, please? A. Pavlov—

Q. First of all—I beg your pardon? A. —was at that time—

Q. Excuse me. Will you tell us first of all who he is? A. Pavlov was in 1952 assistant boss to American Section of Espionage work in KI.

In 1952 it was KI name, not K. V. D. but KI.

Q. Now, on that trip did you meet any other members of the KI? (62) A. Yes. I met that time the KI assistant boss, Stoyanov.

Q. S-T-O-Y-A-N-O-V? A. That's right.

Reino Hayhanen, for Government—Direct.

Q. On this trip did you see Colonel Korotkov? A. No, I didn't see him. I didn't see him in 1952 because I heard that he was——

Q. Well—A. —in charge on different section.

Mr. Donovan: Your Honor——

Mr. Tompkins: I am willing to strike the last.

By Mr. Tompkins:

Q. You didn't see him in 1952? A. No.

Q. Did you see in Moscow that trip Nicoli Svirin? A. Pardon me?

Q. Nicoli Svirin, did you see him on this trip in 1952? Did you meet him? A. Do you mean Mikhail Svirin?

Q. I beg your pardon. Mikhail Svirin? A. Yes, I did.

Q. Would you tell us about him? Was he assigned—

A. They explained to me that Svirin came for vacation to (63) Moscow and he is assigned to Soviet official work in the United States and I have to meet him and have contact with him when I will come to New York.

Q. What would you——

Mr. Donovan: Your Honor, I respectfully move to strike that out as hearsay, and not binding on the defendant.

The Court: Do you object to the fact that he was instructed to meet this man, Svirin? Do you object to that?

Mr. Donovan: No, your Honor.

Mr. Tompkins: That is all the Government is interested in pointing out.

Mr. Donovan: I believe your Honor will find that it was an answer based upon hearsay.

The Court: I think he went further, but I say, do you object to so much that he was instructed to meet Svirin?

Is that the way to pronounce it?

Mr. Tompkins: Svirin, that is right.

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The Court: Svirin.

Mr. Donovan: I do not object to that.

The Court: So much of the answer will stand.

The rest is stricken.

(64) If you had an interview with him; that is something else.

By Mr. Tompkins:

Q. Now, did you meet with any other members of the K. G. B. while you were in Moscow on this trip? Do you recall?

The Court: Just a minute, Mr. Tompkins.

Is it agreed in the record that the person to whom the witness has referred is named as a co-conspirator in the indictment?

Mr. Tompkins: Svirin, that is correct, sir.

By Mr. Tompkins:

Q. Did you meet Svirin? Did you have any conversation with him? A. Yes. I had just a short conversation and he was talking in general about New York City and about life in New York City, that the best part New York City was I have to find some apartment or furnished room when I will come to New York.

Q. Now—

Mr. Donovan: I respectfully object, your Honor, on the ground no conspiracy has yet been shown.

Mr. Tompkins: If your Honor please—

The Court: You can't develop the conspiracy, you (65) know, in a moment.

I will allow it to stand.

By Mr. Tompkins:

Q. At the time you met—

The Court: Did he tell you what his job was? Did Svirin tell you what his job was?

Reino Hayhanen, for Government—Direct.

The Witness: No. I didn't know his job but I knew that he was in official work.

The Court: Never mind that. The answer is no. You have answered the question.

By Mr. Tompkins:

Q. Did you know whether he was attached to the U. N. delegation? A. No, I didn't know it.

Q. At the time you were in Moscow in 1952, were you given any written or oral instructions? A. I got written instructions and I got oral instructions, too.

Q. Would you tell us from whom you got these written instructions? A. Written instructions what I got there was that—

The Court: Just a moment. From whom?

By Mr. Tompkins:

Q. From whom? (66) A. From—those written instructions, they have been signed by Pavlov, his—his boss—and then—

The Court: Is that Pavlov?

The Witness: That's right.

Mr. Tompkins: Pavlov.

By Mr. Tompkins:

Q. And his boss, did you say? A. Yes.

Q. What was his name? A. His boss' name I don't know. I can't remember right now.

Mr. Donovan: Your Honor—

The Witness: And then it was signed, okayed by signature of Stoyanov.

Q. Stoyanov, S-T-O-Y-A-N-O-V? A. That's right.

Mr. Donovan: Your Honor, I respectfully suggest that the answer is unresponsive.

Reino Hayhanen, for Government—Direct.

I believe Mr. Tompkins asked him from whom he received any instructions. I don't believe he has testified these men gave them to him.

Mr. Tompkins: He has testified, as I recall, he got them from Pavlov and that they were signed by Stoyanov.

(67) The Court: I thought that was his testimony. Will you read it, please?

(Whereupon the record was read as follows:

"Q. At the time you were in Moscow in 1952 were you given any written or oral instructions? A. I got written instructions and I got oral instructions, too.

"Q. Would you tell us from whom you got the written instructions? A. Written instructions what I got there was that—

"The Court: Just a minute. From whom?

By Mr. Tompkins:

"Q. From whom? A. From—those written instructions, they have been signed by Pavlov, his—his boss—and then—

"The Court: Is that Pavlov?

"The Witness: That's right.

"Mr. Tompkins: Pavlov,

"By Mr. Tompkins:

"Q. And his boss, did you say? A. Yes.

"Q. What was his name? A. His boss's name I don't know. I can't remember right now, and then it was signed, okayed by signature of Stoyanov."

Mr. Donovan: I respectfully—

The Court: The question is who handed the written instructions to you?

The Witness: Pavlov.

Mr. Tompkins: All right, we will develop it.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. Were they signed by anybody?

The Court: He has told us who they were signed by.

Mr. Tompkins: I thought Mr. Donovan objected to the question and answer. I wanted to prove it.

(69) Mr. Donovan: All I wanted to ask is who gave them to him.

Mr. Tompkins: All right.

The Court: The record now shows, I think, they were given by Pavlov and they were signed by Pavlov and somebody else.

Mr. Tompkins: Stoyanov.

The Court: Stoyanov.

By Mr. Tompkins:

Q. Now, when Pavlov handed you those instructions, what did you do? A. I read those instructions twice and I had to sign them, and after those written instructions I got some oral instructions, too.

Q. Let's just talk about the written instructions for a minute. You signed—you read them twice, you signed them and returned them to Pavlov? Is that right, as I understand you? A. That's right.

Q. Do you remember the contents of those written instructions generally? A. Generally there was that I will be sent to New York City as Mark's assistant.

Q. At that time did you know the name of (70) the resident agent? A. No, at that time I didn't know the name but they told in New York there is some illegal espionage officer and, as they call it in Russian, resident, and that I will be sent as his assistant.

Mr. Donovan: I respectfully—

The Court: "I will" what?

(Answer read.)

Reino Hayhanen, for Government—Direct.

Mr. Tompkins: "I will be sent as his assistant."

Mr. Donovan: I respectfully object to any testimony as to the contents of the instructions and ask that any reference to it be stricken on the ground that it is hearsay.

The Court: Why, Mr. Donovan? Mr. Pavlov is named as a co-conspirator.

Mr. Donovan: Again, your Honor, no conspiracy has yet been proven.

The Court: I am overruling your objection but reserving to you the right to move to strike if no conspiracy is shown.

Mr. Donovan: At a subsequent date, your Honor?

The Court: I am reserving your right to (71) move to strike if no conspiracy is shown.

Mr. Donovan: What about, your Honor, the written—the text of the written instructions?

The Court: I am overruling the objection and reserving to you the right to move to strike if no conspiracy is shown.

Mr. Donovan: What about the best evidence rule?

The Court: I will try it again, Mr. Donovan.

I have overruled the objection.

By Mr. Tompkins:

Q: When you signed these instructions, Mr. Hayhanen, what did you do with them? A: I returned to Pavlov them.

Q: That is the last you have seen them? A: That's right.

Q: Would you tell us what those instructions contained?

A: Those instructions contained that as Mark's—as resident assistant I will get some illegal agents.

The Court: "I"—

(72) The Witness: To get some illegal agents.

The Court: Is that word "illegal"?

Mr. Tompkins: I-I. Illegal, that is correct, sir.

The Witness: And I have to get some espionage information from those agents.

Reino Hayhancn, for Government—Direct.

By Mr. Tompkins:

Q. Now, where were you to get these illegal agents, did the instructions say? A. Yes, those instructions said that those illegal agents I will get from Soviet official people.

Q. By Soviet official people, what do you mean? A. I mean Soviet officials who are coming to the United States or to some other country by Soviet passports.

Mr. Donovan: Your Honor, is it understood that I have a continuing objection to this entire line of testimony as to what these instructions were?

The Court: Yes, you have.

Mr. Donovan: Thank you.

The Court: And the objection, as heretofore stated, is overruled, reserving to you the right to move to strike if no conspiracy is shown.

(73) By Mr. Tompkins:

Q. Did your instructions contain anything relative to money? A. Pardon?

Q. To money? A. Yes. In the same instructions there was that I will get \$5,000 money for cover work; and that I will get salary \$400 a month plus a hundred dollars for trip expenses.

That's—will be salary what I am getting in the United States and then another salary what I was getting in Russian currency, it was different but I left to my relatives.

Q. Did your instructions contain anything concerning communications or codes?

Mr. Donovan: Your Honor, at what point can I properly object under your Honor's previous ruling with respect to the witness being asked a leading question?

The Court: If you are objecting to it being a leading question, I agree with you.

Mr. Donovan: Thank you.

Reino Hayhanen, for Government—Direct.

The Court: Have you told us all of your instructions?

(74) Q. Would you tell us all of your instructions, any instructions you haven't told us about? Is there anything you have omitted? I am speaking now about the written instructions only. A. Let me see. Written instructions, that is what I told. That is about written instructions.

Q. That is all you remember about the written instructions? A. Yes.

Q. Now, at the time that you received these written instructions from Pavlov did you have a conversation with him? A. Yes, I did.

Q. Did you receive oral instructions from him? A. Yes, I did.

Q. Will you tell us about that, please? A. Pavlov explained me that on espionage work we are all the time in war, that—but if real war will be for everyone or between several countries, that I don't have to move—to forget about espionage work. Even if they won't have any connections with me, so still I have to do my espionage work in the country where I was assigned. And he explained that after war our country or our officials will ask from (75) everyone what he did to win this war.

Mr. Donovan: Your Honor, is it understood that my objection applies to his oral instructions as well as his written instructions?

The Court: I so understood.

Q. During this conversation or during the receipt of these oral instructions from Pavlov, did he give you any directions as to the type of information? A. Yes, he did.

He told that it depends what kind of illegal agents I will have, so it depends then what kind of information they can give, where they work or whom they have as friends and such and such things.

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He told that I have to consider with their help in every different occasion or with every different agent.

Q. Now, let me ask you this directly: What type of information were you seeking? A. Espionage information.

Q. Would you describe that, what you mean by espionage information? A. By espionage information I mean all information what you can look to get from newspapers or official way, by asking from, I suppose, legally from some (76) office, and I mean by espionage information that kind of information what you have to get illegal way. That is, it is secret information for—

The Court: Concerning what? What kind of information?

The Witness: Concerning national security or—

The Court: What do you mean by that?

The Witness: In this case United States of America.

The Court: What do you mean by national security?

The Witness: I mean it—that some military information or atomic secrets.

By Mr. Tompkins:

Q. Have you told us all about your oral instructions from Pavlov? Was there anything else? A. That's all what I can recall right now.

Mr. Donovan: Your Honor, I am not clear with respect to the witness' testimony as to whether he simply did not reply to your Honor's question as to what he meant.

The Court: I understood him to say it meant military and atomic information. That is what I (77) understood him to say.

Mr. Donovan: As I understood him, your Honor, he was answering your questions as to what he

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meant but I did not understand him to testify that this was part of his instructions.

The Court: I understood that he said that was part of his instructions.

Have you so testified or haven't you?

The Witness: Yes. I testified that it depend from every agent different kind of information I could get—it depend to where such agent was working or what kind of relatives he had.

Mr. Tompkins: I think he answered your Honor's question, it was my understanding.

The Court: I thought he did.

Mr. Donovan: He answered as to what he means by that term but I don't believe he answered that those specific things were included in his instructions.

The Court: You think you could reserve your ideas for cross examination?

Mr. Donovan: Very well, your Honor.

By Mr. Tompkins:

(78) Q. Now, as I understand, your testimony was that your instructions were to get secret information; is that correct? A. That's right.

Q. Those were the oral instructions you were given by Pavlov? A. Yes.

Q. By secret information, as I understand it, you mean atomic energy or defense information, isn't that correct? A. That's right.

Q. Did you receive any instructions at this time or at any subsequent date on communicating with people in the United States when you arrived here?

Mr. Donovan: Objected to as leading.

The Court: I suppose it is leading, Mr. Tompkins.

Mr. Tompkins: Your Honor—

The Court: Ask him if the subject was broached what was said.

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Mr. Tompkins: I might say this, your Honor. The only reason I use that type of question is certainly not to suggest the tenor of the answer but merely a topic.

(79) We have a witness who is not as conversant in the English language as the rest of us.

All right, I will withdraw the other question and put a new question, your Honor.

Mr. Reporter, what was the—

(Whereupon the reporter read as follows:

"The Court: Ask him if the subject was broached what was said.")

By Mr. Tompkins:

Q. Was the subject of communications mentioned—communications with—

The Court: What were you to do when you got to this country? What was said about that?

The Witness: It was said that when I will come to this country I have to find some room or apartment and then check that nobody is following me and if everything is all right, that nobody is following, then I have to report about it and after that I will get further instructions.

The Court: And to whom were you instructed to report?

The Witness: I had to report to those—results—to, through Soviet officials to Moscow, (80) to K. I.

Mr. Tompkins: Are you through, your Honor?

The Court: Yes.

By Mr. Tompkins:

Q. How were you to report your arrival in the United States? A. I reported it through drop and I explained that I arrived all right, but first report was that I had to put thumb tack in Central Park.

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Q. Whereabouts in Central Park? A. On—it's close to Tavern on the Green where is that horse path, and there was the warning that "Be careful, horse riding," or something like that. I cannot remember exactly words.

Q. This was part of your instructions now in Moscow, as I understand it? A. Yes.

Q. Now, you mentioned a drop. A. Yes.

Q. What do you mean by a drop? Will you explain what a drop is? A. By a drop I mean a secret place which you or several people just know, where you can hide some container that—suppose if I will hide container (81) in that drop and will let know to another person that I have there information, and another person will pick up that container and will get it.

Q. Were you given the location of any drops in your instructions? A. Yes. I know several locations.

Q. Will you tell us the locations of those drops which were given to you in your instructions in Moscow? A. About instructions where those drops are located, all been located, drop No. 1 was located on Jerome Avenue; and then drop No. 2 was located on Central Park.

Q. Excuse me. You say drop No. 1 was located on Jerome Avenue? A. Yes, that is right.

Mr. Tompkins: Will you mark this for identification, please, one exhibit?

(Two photographs were marked Government's Exhibit No. 2 for identification.)

Q. I have here Government's Exhibit 2, for identification. Would tell us, if you can recognize that picture (counsel hands documents to witness), identify it, if you can. (82) A. (Witness examines documents.)

Yes, that is right. This is the picture of drop No. 1, and over here on another picture there is even that hole between wall and ground where that drop was.

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The Court: Are there two photos or one?

Mr. Tompkins: There are two photos, one showing the same drop. In other words, one is the general area and the other is more specific.

The Court: Is that drop No. 1 or No. 2?

The Witness: No. 1.

Mr. Tompkins: Drop No. 1, your Honor.

We would like to offer this.

Mr. Maroney: They have got a copy.

Mr. Tompkins: You have a copy of this.

Mr. Donovan: Your Honor, we would have no objection to the introduction of the photographs except that I don't understand where the drop was located. He was pointing to it but I couldn't see.

Mr. Tompkins: I will ask the witness that.

By Mr. Tompkins:

Q. Would you show us—perhaps take a pen and will you put a little x? (83) A. With ink? It is between that wall and between this (indicating).

The Court: Just draw an arrow there.

The Witness: This arrow, behind that wall. This one (indicating).

The Court: Don't blot it, Mr. Tompkins; just let it dry.

Mr. Tompkins: All right.

Q. So that the defense understands, will you describe the relations of these two pictures and— A. Yes.

Q. —where the drop was located?

The Court: Why don't you state what it is and maybe Mr. Donovan will agree with you?

Mr. Donovan: I won't object as to the form of the question. I just would like him to—

Mr. Tompkins: I would like to have the witness state just what he—

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The Witness: Okay. I—this is that—you have to go up by this stairs (indicating) and to turn to the right.

Then it will be that drop on your left, your left side. Left-hand side when you make that right turn.

(84) Q. Where is the actual drop located? Is it behind the wall there? A. It is between this cement wall and behind that location there is hole.

The Court: I think the witness indicated a stairway on top of the two photographs and the recess on the bottom of the two photos. Is that correct?

Mr. Tompkins: That is correct, isn't it?

Will you mark this in evidence?

(The two photographs heretofore marked Government's Exhibit No. 2 for identification were marked and received in evidence.)

Mr. Tompkins: Would your Honor like to see it?

The Court: Yes, please.

(Mr. Tompkins hands photographs to the Court.)

The Court: I think that the record should be clearer as to what is known by Jerome Avenue. I think you ought to agree as to what part of Jerome Avenue is shown in this photo. Perhaps Mr. Donovan will agree to it.

Mr. Tompkins: Mr. Donovan, this drop was located on Jerome Avenue in the Bronx, New York, (85) at approximately 165th to 167th Street.

The Court: Is that satisfactory?

Mr. Donovan: Yes, I know that neighborhood, your Honor.

By Mr. Tompkins:

Q. Now, did you use this drop during the entire time you were here in the United States? A. I was using it just

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once, I think, and same thing, that once I got message from Soviet officials.

Because that drop was not convenient I got then more convenient drops later.

(86) Q. So you only used this drop once, as I understand your testimony? A. Yes.

Q. Were you given—I think you mentioned a location of a drop No. 2? A. Yes.

Q. Where was that located? A. It was in Central Park under the bridge.

Q. And what was that drop to be used for? Communications or— A. Yes. It was for communications and—

Q. With whom? A. With Soviet officials.

Mr. Tompkins: Will you mark this?

(Two photographs were marked Government's Exhibit No. 3 for identification.)

(The Clerk hands photographs to witness.)

By Mr. Tompkins:

Q. I have here Government's Exhibit 3 for identification and ask you if you can tell us what that is? A. (Witness examines photographs.)

This is drop No. 2, and where is this white spot, that's for—that's the hole where there was that drop.

Mr. Tompkins: (Directed to the Court): Do you (87) see the white spot?

The Witness: It is right over here (indicating).

By Mr. Tompkins:

Q. That was the hole where the drop was located? A. Yes.

The Court: Is that on the second?

Mr. Tompkins: That is on the second.

The first photo shows the bridge, your Honor, and the second shows underneath the bridge.

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Mr. Donovan, I will offer this in evidence.

Mr. Donovan: Okay.

(Two photographs heretofore marked Government's Exhibit No. 3 for identification were marked and received in evidence.)

Mr. Donovan: Could your Honor have the Government state for the record the specific location?

The Court: Yes. What bridge are you talking about? I think there is more than one bridge in Central Park.

The Witness: This bridge is close to that water reservoir. It is—if you enter that Central Park, it is around 110th Street, I think—104th Street or 106th Street, I think. That big water reservoir what (88) is.

I cannot tell you more exactly. Otherwise I have to show it over there where it is.

I know how to go but I cannot remember exactly the street number from what you have to go.

The Court: I think it is located near the reservoir.

By Mr. Tompkins:

Q: In Central Park? A. Yes.

Mr. Tompkins: Your Honor mentioned the specific location in the brick. The witness testified that the drop was where this white spot is showing on the photograph, so we have the precise location of it.

Would your Honor like to see it?

(Mr. Tompkins hands photographs to the Court.)

Mr. Donovan: Your Honor, I would just like to point out that as far as my memory serves me, the reservoir is nowhere near 110th Street.

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The Court: Well, I don't think it is near 110th Street, but I think it is just generally on the west side of the park, and I think——

The Witness: Maybe it is 94th, 96th.

The Court: And the witness corrected it to (89) 104th.

Mr. Donovan: I don't think that it is anywhere near 104th Street.

The Witness: I cannot remember exactly the street.

The Court: Can we agree that this bridge apparently spans a bridle path?

Mr. Tompkins: It does, your Honor. If Mr. Donovan will agree, we know that it does.

The Court: Would you agree that that bridge spans a bridle path, Mr. Donovan?

Mr. Donovan: Yes, your Honor.

The Court: That may tend to locate it.

Mr. Tompkins: I think that will locate it.

Actually, your Honor, this bridge is approached by entering around 95th or 96th Street, the entrance there, and then following the footpath that borders around.

Mr. Donovan: As I understand it, the witness cannot more definitely identify it, your Honor?

The Court: Well, without arguing that, do we agree that the bridge has been sufficiently located for the purposes of this trial or do you wish it located more accurately.

Mr. Donovan: Of course, your Honor, what I (90) would wish is that the witness would locate it more accurately?

He has testified that this is a drop, and I am simply bringing out that the man has had the bridge moving from 110th Street down to various other places.

Mr. Tompkins: Wait a minute. I didn't understand that.

Reino Hayhanen, for Government—Direct.

What did the witness say?

The Court: Never mind what the witness said. This is a physical fact. There is only one bridge to which that photograph refers.

Now, if you gentlemen can agree as to which bridge that is, well and good. If you can't, we will get somebody who can tell us precisely where it is. That is all there is to this.

Mr. Donovan: Your Honor, I again say that so far as claiming that there is such a bridge, or having someone testify there is such a bridge, there is no question in my mind that there is such a bridge.

What I am bringing out is that this man is testifying that he used this place as a drop.

Mr. Tompkins: Wait. He — This was a drop assigned, your Honor. He has never testified he used (91) this place.

The Court: I haven't heard him say that he used it yet.

Mr. Tompkins: This was an assigned drop in Moscow.

Mr. Donovan: Do I understand, your Honor, that this is a photograph of a place this witness has never seen?

Mr. Tompkins: We don't know that.

The Court: I don't know. Perhaps if you are a little more patient we will find out.

Did you ever see this drop?

The Witness: Yes, I saw it.

The Court: Did you ever use it?

The Witness: No, I never used it but I can —

The Court: But you did see it?

The Witness: No. I saw it and I was there, but I never used it, and by the map of New York City I can show almost the exact spot where that bridge is located.

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That is what I mentioned, I cannot remember exactly the closest street what is. But on the map of New York City there is that reservoir and there is even that road where people can walk over that (92) bridge.

By Mr. Tompkins:

Q. Now, was another drop assigned in Moscow? A. Yes. Then—

Q. What was it? A. —Drop No. 3 was located in Fort Tryon Park.

Q. This was a drop assigned in Moscow? A. That's right.

Mr. Tompkins: Would you mark those?

(Two photographs were marked Government's Exhibit No. 4, for identification.)

The Court: Number four, for identification.

By Mr. Tompkins:

Q. I have here Government's Exhibit No. 4, for identification. Do you recognize that and, if so, can you tell us what it is (counsel hands photograph to witness)? A. (Witness examines photograph.)

Yes, this is photo of drop No. 3 and that drop is under this lamp post.

Q. Would you put a mark there, please?

This is the other portion of it (counsel hands photograph to witness). Just put these together.

Where do you say this drop was located? A. Under this lamp post what—

(93) Q. I don't mean the specific—the area? A. It was Fort Tryon Park.

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The Court: Fort Tryon Park, I think he said.

The Witness: Yes.

Mr. Donovan: Your Honor, do I understand that this man was instructed in Moscow to use this drop beneath this electric light pole?

Mr. Tompkins: He was giving the location, as I understand it.

Mr. Donovan: And from a map of New York City, is that correct?

The Witness: No.

The Court: No. He didn't mention the map of New York City in connection with this.

He said if he could see a map of New York City, he would show you the bridge we talked about and which we passed.

Now we are to Drop No. 3. He said in Moscow he was instructed to use Drop No. 3, and he identified this photograph as showing Drop No. 3. That is as far as we have gone.

Mr. Donovan: Can't we have it developed as to how he was instructed to use this drop?

The Court: I think that would be proper on cross (94) examination, Mr. Donovan.

Mr. Donovan: Your Honor, I submit—I am going to see a map of New York City where you could identify, in Moscow, a drop under this one pole—

The Court: Oh, please.

Mr. Donovan: —in Fort Tryon Park.

Mr. Tompkins: The witness has not said anything about identifying this one lamp post in Moscow. He was just given the location.

The Court: What is the pending question?

Mr. Tompkins: There isn't any. I think there is a pending objection.

Mr. Donovan: There is a pending objection, your Honor.

I am objecting to the—

•*Reino Hayhanen, for Government—Direct.*

The Court: I have heard a speech. I haven't heard an objection.

It is easier to rule on an objection than a speech. What is the objection?

Mr. Donovan: I am objecting to the admission of the photograph in evidence on the ground—

The Court: I understood you to say that there was no objection. Are you recanting that?

(95) Mr. Donovan: I have never said there is no objection to the introduction of that photograph.

The Court: Then I did not understand you. Are you objecting?

Mr. Donovan: I am.

The Court: Isn't this drop No. 3?

Mr. Donovan: 3.

The Court: Is this Drop No. 3, I mean?

Mr. Tompkins: It is drop No. 3, your Honor.

Mr. Donovan: I am doing it, your Honor, on the ground that while it is understandable that anywhere in the world you could properly describe these two locations, I respectfully submit that I wouldn't know how to send anyone to that place; and I say that to say that the witness was instructed to find this pole in Fort Tryon Park is simply incredible.

Mr. Tompkins: That wasn't his instructions. The witness has testified he was given a location and the witness is testifying that he knows the location and this accurately represents a picture of the location.

Mr. Donovan: Can't we find out, your Honor, how he was directed to that location? It seems to me—

The Court: It seems we are only concerned now (96) with whether this photograph is a correct representation of it. That is all we are concerned with for the moment.

Mr. Donovan: Your Honor, unless this is the specific drop he was given in Moscow, the photo-

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graphs are wholly irrelevant and immaterial to this case.

Mr. Tompkins: We might clarify it, your Honor.

By Mr. Tompkins:

Q. Did you ever use this drop? A. Yes, I did.

Q. You have been there? A. Yes, I was many times, there.

Q. This is the same drop that was assigned in Moscow?

A. That's right.

Q. Is this an accurate representation? A. And on that lamp post there is a certain number, too. By that number I found it.

Q. The number of the lamp pole? A. Yes.

Mr. Tompkins: I again offer it.

The Witness: By that number I found it.

(97) Mr. Tompkins: I again offer this.

Mr. Donovan: No objection.

(98) Q. Mr. Hayhanen, at the close of this morning's session you had described to the Court and jury the location of three drops given you in Moscow; is that correct?

A. That is right.

(99) Q. Would you explain to the Court and jury what a drop was and what it was used for? A. Like I explained before, a drop is used to give some secret messages from one person to another.

The Court: Well, it is a receptacle, isn't it? Isn't it a receptacle?

The Witness: I am sorry, but I cannot understand enough English.

The Court: Don't you know the Russian term for receptacle, Mr. Tompkins?

Mr. Tompkins: No, your Honor, I don't.

Mr. Donovan: I believe a drop is a location, not a receptacle.

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The Court: Well, would you accept that as a location?

The Witness: Location, yes. A drop is a certain location where one person would put a message and another person will take that message from that location.

The Court: Well, it isn't open to view, is it?

The Witness: No, it is hidden from other persons.

A drop is that kind of a place that just certain persons, two or maybe three persons know about it, (100) where it is and how it is hidden, the message.

Q. Well, now, what type of message do you put in the drop?

Mr. Donovan: May I ask your Honor whether this relates to the actual evidence in this case?

The Court: Well, do you mean what kind of a message did he put in one of these drops? If he did? He said he used two or three of these drops.

Mr. Tompkins: That is right, sir.

The Court: How he used them?

How did you use the drops?

The Witness: I used the drops to report to my bosses what I did in a certain period, in a certain time, and how I did it, just to report what my bosses asked me to do.

Q. Did you use containers? A. Yes, I did.

Q. In connection with the drop? A. That is right, and that is where I mentioned those drops were used for a certain number of persons and the certain ways that those containers ordinary persons wouldn't know what it is, is it just plain bolt or is it inside that bolt some message.

The Court: Is that word ball?

(101) The Witness: Bolt.

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Q. In other words, you are referring to a hollowed-out bolt? A. Yes.

Q. What other containers did you use in the drops, if any? A. Coins, screws, flashlight batteries, that is many of what I was using, and match books.

Q. Now, can you describe for us, for the Court and jury, a coin container? A. Yes, a coin container is a hollow coin made from two coins, but made that way, if you look first at it that is a usual coin, but with needle you can open it and there is space to hide some message on film.

Q. What kind of film? A. Or slip of paper.

Q. What kind of film? A. Soft film or usual film, but made in smaller than 35 millimeters.

Q. You used the term "soft film." Could you explain what soft film is? A. Soft film means that when you take some picture on original film that then you prepare soft film to put in dioxane, and when that film stays in there for several (102) hours it will become soft film, just what you took picture will be on that film, but that cellophane will disappear from that film.

Q. In other words, originally it is on hard film? A. That is right.

Q. And that would be stiff? A. Yes.

Q. And is this a chemical that you described? A. Yes.

Q. When you put it in that chemical, does it take the hardness out of it? A. Yes, it does.

Q. And then, as I understand you to say you can then fold it and put it in a container? A. That is right.

Q. Now, did these messages always follow the same form? A. No.

Q. What form did they—what were the forms of the messages? A. Maybe I didn't understand your question. What do you mean by that question?

Q. By form, I mean, was it in English or Russian or code? (103) A. Well—

Q. How were they written? A. Messages, I was getting in English and in Russian. I was getting both kind of messages.

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Q. English and Russian? A. That is right.

Q. Now, messages that you sent, were they the same?

A. Yes, that is right. I was giving messages in English and in Russian.

Q. Now, did you send or receive any messages in code?

A. In code, yes, I did.

I was sending them and I was getting in code, several messages.

Mr. Donovan: Your Honor, may I suggest that we are entitled to know with respect to this testimony that Mr. Hayhanen is giving, when and where such messages were given?

When was such a message given in code? In other words, sufficient detail that we can meet the testimony.

The Court: Well, if that isn't covered in direct, Mr. Donovan, you know you will have ample opportunity in cross to develop the details.

(104) You realize that?

Mr. Donovan: I do, your Honor, but up to date this is sort of an expert discussion in espionage.

The Court: We are dealing with a specific time.

He told you when he arrived in the United States. He hasn't been asked how long he functioned, but certainly it is in—it begins in 1952, doesn't it?

Mr. Tompkins: If your Honor please, the only purpose of that, asking the witness about drops and the general questioning, is to apprise the jury of what a drop is.

The government certainly will get into specific questions as to the use of specific messages.

The Court: I suppose so.

By Mr. Tompkins:

Q. Now, in addition to the drops that were the three drops which you testified to this morning and which were

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given to you in Moscow, were you given any other locations?

A. Yes, I got—and then three more drops because that Jerome Avenue drop was not convenient.

Q. Well, now, were these drops given to you in Moscow?

A. Yes, those what I mentioned before.

Mr. Donovan: Again, your Honor, could we not (105) know when and where he was given these instructions?

The Court: I think that if you will just be a little patient, Mr. Donovan, that may develop.

Now, about the other three drops, where were you when you were given those?

The Witness: I was already in New York City when I got those three more, and I got them that way, that Jerome Avenue drop was not convenient to use, so then, and the same thing about that bridge drop in Central Park, so those be closed, not used.

The Court: Will you tell us by whom you were given these instructions, these other three drops?

The Witness: From Russian officials I got the messages that they are not convenient to use and they picked up some more new drops and No. 1 drop was picked up in Prospect Park in Brooklyn.

Mr. Donovan: Your Honor,—

The Witness: No. 2 was picked up—

Mr. Tompkins: Just a moment.

The Court: No, not just a moment. If you will not interrupt the witness, I will listen to you.

No. 2 was where?

The Witness: No. 2 was in Manhattan, 89th Street on Riverside Drive close to that Memorial to Soldiers (106) and Sailors—or, yes, to Soldiers & Sailors.

No. 4—

The Court: No. 3; we haven't gotten No. 3 yet.

The Witness: No. 3 was the same like I mentioned in Fort Tryon Park.

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The Court: You have given that already.

The Witness: Yes, it was No. 3, and it stayed No. 3 up to, and No. 4 was at the end of 7th Avenue, Manhattan Subway close to that bridge, just upper side of bus stop, the closest bus stop at that bridge.

The Court: Have you finished?

The Witness: Yes.

The Court: About when was it that you got these additional drops?

The Witness: It was in 1954.

The Court: Can you fix it any closer?

The Witness: March, 1954,—May, 1954.

The Court: Between March and May?

The Witness: Between March, April and May.

The Court: Now, is that what you wanted to know, Mr. Donovan?

Mr. Donovan: In addition, your Honor, I want to know who are these persons that he has referred to as "Russian officials," who are these people?

(107) The Court: Let's not interfere with Mr. Tompkins. He may ask that question.

Mr. Donovan: And next, your Honor, how did he receive these instructions?

Now, if it please the Court, I was under the impression this morning that when these earlier exhibits were put in that these were instructions that he received in Moscow.

Now, as I understand it, he received it in New York.

The Court: No, as to the first three, his testimony is that he received them in Moscow; as to the latter four, one of which has already been included in the first three, he said that he received the instructions in New York.

Is that your testimony?

The Witness: That is right.

Mr. Donovan: He has never told us except under your Honor's last question; he has never told us on

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any of these from whom and precisely when to the best of his recollection.

The Court: All I am saying is that if you will give Mr. Tompkins a chance, it is possible that he will develop it.

(108) By Mr. Tompkins:

Q. Mr. Hayhanen, will you describe who these Soviet officials that you have referred to in your testimony are?

A. I know just about one Soviet official who was connected, who had conversations, several conversations with me and would be talking about these espionage work.

The Court: Who is the one you know? What is his name?

The Witness: Svirin.

The Court: Well, he is named in the indictment, isn't he?

The Witness: That is right, he was mentioned already today.

Q. Now, when you speak of communicating with Soviet officials, receiving communications through drops and sending them, who are you referring to? You called them Soviet official people, I believe? A. Yes.

(109) Q. What do you mean by that term? A. I mean like I explained already this morning, I mean that kind of people who came to this country with Soviet passports, Soviet citizens.

Mr. Donovan: Your Honor, I respectfully object that he should instead of simply defining, what do you mean by such a word, he should tell who are these specific Soviet officials.

The Court: He has told us, that there was only one that he knew.

Mr. Donovan: But then, your Honor, by saying that he dealt with Soviet officials, as I understand his testimony, and yet he cannot apparently pinpoint his testimony who these people are,—

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Mr. Tompkins: Your Honor, he was instructed in Moscow who to communicate with.

The Court: You know, these arguments are diverting, but they also interfere with the trial.

If you have an objection, Mr. Donovan, if you will state your objection, I will try to rule on it.

Mr. Donovan: I object, your Honor, to the last question and ask that the answer be stricken from the record.

The Court: May I hear that last question, (110) please?

(The court reporter thereupon read the last question.)

The Court: I think you better ask him if he met any of the people that he is talking about.

Mr. Tompkins: If I can develop it this way, I would rather.

The Court: All right; you do it your way.

Q. As I understand your testimony, you were given the location of three drops, in Moscow, in your instructions?

A. That is right.

Q. And the purpose of locating those three drops was to enable you to communicate with Soviet officials, is that correct? A. That is right.

Q. Did you ever meet any of those Soviet officials? A. I met only Svirin, like I mentioned before, and by Soviet officials, I meant Soviet people, like I told, even maybe I didn't meet them, suppose I was getting a ciphering message, that was somebody was in Soviet Legation, ciphering or deciphering, and he was Soviet official, but him I didn't meet.

Mr. Donovan: Your Honor, I respectfully suggest that all of this testimony is highly prejudicial (111) and is properly objectionable.

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The Court: I don't think it is prejudicial, I agree that it is quite vague and indefinite; but I can't see that it is prejudicial.

Mr. Tompkins: If your Honor please, all the witness testified to then, as I understand it, is that he communicated with them, but he never met them. He met one, Svirin, that seems to be the point of Mr. Donovan's objection.

The Court: I think specifically he has said that he deposited in the drops information intended for certain people whom he never met, isn't that so?

The Witness: That is right.

Mr. Tompkins: Pursuant to his instructions in Moscow.

The Court: Yes.

I guess that is as far as he can testify; except that he dealt with this man Svirin.

Mr. Tompkins: Correct.

The Court: The jury understand, I think, the testimony thus far?

(The jury indicated in the affirmative.)

Mr. Tompkins: Will you mark this for identification?

(Referring to photographs.)

Q. I have here, Government's Exhibit No. 5 for identification.

Mr. Hayhanen, do you recognize it, and if you do, will you tell us what it is, please? A. Yes. This is that new drop, No. 1, what I mentioned just a while ago.

The Court: That is the Prospect Park?

The Witness: Yes, it is Prospect Park, Brooklyn, New York State; and it is pinpointed to that white spot.

Mr. Tompkins: Will you mark it, please?

(The witness thereupon marked the photograph.)

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Q. Will you describe very briefly where that was located? A. It is located in Prospect Park, Brooklyn.

If you go to Prospect Park by BMT, Brighton Lines, to Prospect Park Station, and get inside the park from Lincoln Road and it will be about half a mile, it would be from that station.

Q. Where is the specific location of it? A. There is driveway, but it is not used by cars, it is closed for driving; only police cars are using that drive- (113) way, and then there is horse-back close to it, but I don't know how I can explain it closer:

The Court: Well, as you enter Prospect Park, do you turn to your right, your left, or do you proceed straight ahead?

The Witness: When you come out from that Prospect Park Station on Lincoln Road, you have to turn to the right.

The Court: After you have entered the park?

The Witness: No, just when you come out from that subway station.

The Court: I have got you in the park. You have entered the park, and which way do you turn then?

The Witness: Then I have to turn to the right, under that bridge; after that bridge there will be another bridge, and then I have to cross that bridge, where is that boat station, and I have to go straight ahead a little bit to the left and under another bridge and then it will be first left turn where are these stairs what are on picture.

Q. And was the drop located on the stairs? A. Yes, on the left side between stairs on wall.

Mr. Tompkins: I would like to offer this in (114) evidence at this time. It is marked here (indicating).

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(Mr. Tompkins exhibited photograph to Mr. Donovan.)

Mr. Donovan: Your Honor, the defense would have no objection to the first of these photographs showing where the alleged drop was, but the second one which has a hand and a ruler in it, I believe we would object to it.

In other words, I don't understand—

The Court: Is the second part a necessary part of your exhibit?

Mr. Tompkins: It just clarifies the exhibit, your Honor.

One shows the steps, a drop which isn't very large, and this is a close-up of the particular step.

The Court: Does it also show the drops or the drop itself?

Mr. Tompkins: It shows the drop itself.

Mr. Donovan: It shows the drop itself, your Honor; but I don't think that actually any more clearly in here, but meanwhile it has a hand and a ruler doing something in there.

Mr. Tompkins: If Mr. Donovan feels— (115) All right, we will withdraw the second sheet.

I understand that is not objected to?

Mr. Donovan: Yes, sir.

The Clerk: Exhibit No. 5 in evidence.

(Photograph marked Government's Exhibit No. 5 in evidence.)

Mr. Tompkins: Does your Honor want to see that?

(Photograph handed to the Court.)

By Mr. Tompkins:

Q. Now, I have here, Government's Exhibit No. 6 for identification; do you recognize it? And can you tell us

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what it is? A. This is my last drop, No. 2, for magnetic containers.

Q. Will you tell us what a magnetic container is? A. A magnetic container is that kind of a piece of metal that sticks to another metal, and holds onto.

The Court: By magnetic attraction?

The Witness: Yes, that is right.

Mr. Tompkins: Can you mark the specific location on that, please? Of your drop?

(The witness proceeded to mark the photograph.)

Mr. Tompkins: The Government would like at this time to offer this exhibit into evidence.

Mr. Donovan: May I ask your Honor whether it is (116) his testimony that he put a magnetic drop here or he put it down there?

The Court: I think he stated that he used it with a magnetic container.

Did you use this drop?

The Witness: Yes.

The Court: How did you use it?

The Witness: I was sending some messages through that drop with magnetic containers, and I was receiving some magnetic containers, messages into those containers.

The Court: Does that answer your question?

Mr. Donovan: Yes, your Honor.

The Court: Any objection?

Mr. Donovan: Will your Honor again with respect to this exhibit, if the witness will identify the precise place where this drop is supposed—

The Court: Well, he said it was on Riverside Drive, near the Soldiers & Sailors Monument, 89th Street.

Mr. Donovan: What I meant, on this photograph if he will identify it, we will not object to this.

The Court: Please talk about one thing at a time.

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Mr. Donovan: All right, your Honor.

(117) The Court: We are talking about Exhibit No. 6 for identification.

Mr. Donovan: With respect to the first half of it, your Honor, I ask that the witness show us on the picture where this drop was supposed to have been.

Mr. Tompkins: If your Honor please, these two pictures, one is a general picture, the whole area showing a big long fence, and it is only for aid for the jury in seeing the specific location.

It is the close-up of the fence showing the area.

The first picture which Mr. Donovan wants him to mark shows a picket fence with about two hundred pickets here which would be of no assistance.

The Witness: Excuse me, I can pinpoint on Picture No. 2—

The Court: Just a minute, Mr. Witness.

Does either photograph purport to show the drop itself?

Mr. Tompkins: They both do, your Honor.

The Court: Or do they show the structure of which the drop is a part?

Mr. Tompkins: Well, the first photo is a general (118) general picture of the area showing the monument; showing some of the grounds and trees and the fence.

The second one is a close-up of the fence area.

The Court: Can the witness identify the location of the drop in the second photo?

Mr. Tompkins: I will ask him that, your Honor.

Mr. Donovan: On the first one.

Mr. Tompkins: Well, if he can on the first.

(119) By Mr. Tompkins:

Q. Can you identify the first, the location of the drop in the first photo? A. Yes.

The Court: Mark it on there.

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Q. Mark it on there. A. (The witness proceeded to mark the photograph.)

The Court: Now, I think that Mr. Donovan said if it could be so marked, he would have no objection.

Mr. Donovan: That is correct, your Honor.

The Court: So that No. 6 for identification is received in evidence without objection; right?

Mr. Donovan: That was with respect to the first photograph, your Honor.

Now, with respect to the second photograph, again, I respectfully submit that unless this is Mr. Hayhanen who has got a ruler out and measuring it and so on, I suggest that it is cumulative and there is no need for it, and that it having been sufficiently pinpointed on the first half by the witness, that there is no need for the second photograph, and hence would object to that.

The Court: You wish both in?

(120) Mr. Tompkins: I would like to be heard on that, your Honor.

The Court: Well, if the witness would identify on the second photograph the drop, perhaps Mr. Donovan's objection will be done away with.

Mr. Tompkins: He has identified it already.

I think I have already pinpointed that out already.

The Court: Well—

Mr. Donovan: Is this Mr. Hayhanen?

Mr. Tompkins: No, that is not Mr. Hayhanen.

I think the objection of counsel is that there is an arm and a ruler and I think that he objects to that; but I see where that—I fail to see the materiality of anything prejudicial there.

Mr. Donovan: Your Honor, if Mr. Hayhanen can identify the arm and the ruler, and who the man sitting there is, I have no objection to it.

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I am simply pointing out that this is a photograph with somebody's arm in there.

Mr. Tompkins: What harm does the arm do in there; I fail to understand that.

The Court: Does that ruler purport to identify anything?

(121) Mr. Tompkins: No, I would say the purpose of the ruler was there merely to show—

The Court: To indicate a measurement?

Mr. Tompkins: It is just to give some indication of size, that is all.

The Court: Then would it be correct to say that in offering this photograph, you do not rely upon the right—apparently the right arm and the ruler to—

Mr. Tompkins: Not at all.

Mr. Donovan: We believe that—

The Court: Do you object?

Mr. Donovan: I do.

The Court: Overruled in view of Mr. Tompkin's statement that it just appears in the record.

Mr. Tompkins: I have here Government's Exhibit No. 7 for identification.

Will you look at that and tell us if you recognize it?

The Witness: This is drop No. 4, and like I explained before, it is at the end of 7th Avenue close to that bridge, in Manhattan.

By Mr. Tompkins:

Q. Can you put a mark on there, showing the (122) relative location of it? A. Yes, I will.

(The witness proceeded to mark the photograph.)

A. The location, I believe it is just behind the lamp post.

The Court: That is the location of the drop?

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The Witness: Yes, it is the location of drop, and it is at bus station, but stop, you can see on this photo, bus stop sign, but you cannot see this pole.

The Court: All right. Does the lamp post appear on that photograph?

The Witness: Yes, just behind that lamp post.

The Court: All right; just put a figure four on the lamp post, please.

The Witness: All right.

(The witness proceeded to mark the photograph.)

The Court: And your testimony is that the drop is on the rear of that lamp post as it appears on that photograph?

The Witness: That is right.

Mr. Tompkins: Your Honor said on the rear of the lamp post or to the rear?

The Court: I presume I said on, mistakenly.

(123) How about at, at the rear, would that be correct?

Would you settle for at?

Mr. Tompkins: I will, sir.

The Government would like to offer this exhibit.

Mr. Donovan: Your Honor, we are not objecting to these various pictures of the drops, but it is my understanding under your Honor's ruling that the Government in through course will develop from whom the man received the instructions at each one of these drops, at what time he did use it, and the various other things which would make these pertinent to the case.

That is my understanding.

Am I correct in it, your Honor?

The Court: I would rather that you wouldn't try to force a treaty with the Court. You have stated your understanding, and I think that amounts to this, that you expect to move to strike it if it is not that?

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Mr. Donovan: That is correct, unless the Government does develop these specific things.

The Court: And in that event, you will not move to strike?

(124) Mr. Donovan: That is correct, on that ground. Did he testify that he has used this?

The Court: I am not sure.

Mr. Tompkins: I asked him the location of the drop that he has testified under the Court's questioning as to whether he had any additional drops, and that he had received directions for three additional drops here in New York.

The Court: Well, he hasn't been asked specifically whether he used this.

Mr. Tompkins: Well, what relevancy does that have to the recognition of the drop?

I haven't gotten to some of the questions.

All I am asking is whether he recognizes the drop.

The Court: Maybe to recognize it he would have to see it.

By Mr. Tompkins:

Q. Have you seen this drop? A. Yes, I saw it, and I used that drop with Mark. We been at that drop with Mark himself. We been together and I put myself one magnetic container to that drop and Mark was watching me.

Q. By Mark you mean the defendant? (125) A. I mean defendant, yes.

Mr. Donovan: May I ask, was he watching you so that he was seeing him?

The Witness: No.

Mr. Tompkins: Is this cross examination?

Mr. Donovan: This is *voir dire*.

The Witness: He was walking around that nobody can notice that I put that magnetic.

The Court: He was in a position to see you; is that what you are saying?

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The Witness: I am sorry if I cannot speak perfect English, but I meant that I put that magnetic container into that drop and Mark was close to that drop and he of course was looking around that nobody can notice us.

Mr. Donovan: No objection, your Honor.

Mr. Tompkins: Is that No. 5?

The Clerk: That is Exhibit No. 7.

Mr. Tompkins: I am just going to let the jury look at these exhibits, your Honor.

By Mr. Tompkins:

Q. Now, to get back to the drops that were given to you in Moscow, in addition to those drops, Mr. Hayhanen, were you given in Moscow the location of a signal area? (126)

A. Yes, I got one signal area at 86th Street, Manhattan.

Mr. Donovan: Could I—

The Court: I would so much prefer that you would not interrupt the answer, Mr. Donovan.

I would like to hear it and the jury would like to hear it.

Don't interrupt. Wait until an answer is finished, and then make any objection or any observation that you think is proper.

Mr. Donovan: I don't want the answer on the record, your Honor, and I object to the question as leading and don't believe that the answer should be given, so that the jury can hear it.

It doesn't do me much good to have it stricken.

The Court: Can I hear the question?

I think the question is, while you were in Moscow, were you given a signal area?

Mr. Tompkins: Were you given the location of a signal area, that is correct.

The Court: Then the objection is overruled.

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Q. Will you please answer, Mr. Hayhanen? A. Yes, because drops and signal areas, they are in different places; so I got signal place too, place for signals.

Q. Where was that area? (127) A. It was 86th Street and Central Park West, subway station, subway station entrance.

Q. Now, did you use that location? A. Yes, I did.

Q. Was that location subsequently changed? A. Yes, it changed to opposite side of street through the entrance of Central Park.

Q. When was that changed? Do you recall? A. It was changed—

Q. Well, roughly, to the best of your recollection? A. To the best of my recollection, it was changed in 1956.

Q. Now—

Mr. Donovan: Your Honor, at this point, may we not know by whom it was changed?

The Court: I would so much prefer that you would reserve these matters to your cross examination.

I don't like to direct the Government on how to develop its testimony, Mr. Donovan.

Mr. Tompkins: Would you mark that for identification, please?

Mr. Donovan: These questions I am asking, your Honor, I know you appreciate that they deal on whether or not we should object to the admissions to these (128) as exhibits.

The Court: Yes.

By Mr. Tompkins:

Q. I have here Government's Exhibit for identification; do you recognize that, Mr. Hayhanen? And if so, can you tell us what it is? A. Yes, there is the last place for signals and on other side of the street, you can see that first place for signals in the same picture.

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Q. Will you mark the first place on that with an O?

The Court: No, first is one; second is two.

Mr. Tompkins: I was going to do it original. I am sorry.

Q. Mark it one and two. A. On first signal place, there is standing man, just behind him is that signal place.

Q. And the second signal place? A. And the second signal place is over here.

The Court: Have you marked them respectively, one and two?

Q. Mark the first one one and the second one two.

(The witness proceeded to mark photograph.)

A. Yes, I did.

(129)^d Mr. Tompkins: I would like to offer this at this time, your Honor.

Mr. Donovan: Well, your Honor, all that I can say is that until such time as we have testimony as to from whom he received the instructions, as to whether they were oral or written, and ask to the identity of who gave them, I must continue to object to these exhibits.

The Court: It seems to me that he has testified to an ultimate fact that there was a signal area as originally instructed, No. 1; and it is changed, No. 2; that is the ultimate fact.

Now, the process to where it was arrived at is something else.

If you object to that, then say so; if you don't object, say so.

Mr. Donovan: I object, your Honor.

The Court: Overruled.

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(130) The Court: Before you leave this, please instruct the jury and the Court what you mean by signal area.

Mr. Tompkins: I am going to ask the witness this question right now.

By Mr. Tompkins:

Q. Will you explain to us what you mean by a signal area? A. By signal area I mean the place where I leave some kind of signal that in certain place I left a message, that it is hidden in drop No. 1 or in drop No. 2 or in drop No. 3 or 4. And by those stakes on that fence, if I put that signal on second one it means that I have magnetic message or magnetic container with message in drop No. 2.

That is what I mean by signal area.

Q. To clarify that, by this signal area, this is a signal area which you advise somebody else what you are doing, is that correct?

Mr. Donovan: Objected to as leading.

The Witness: Yes, that signal area is that somebody is checking that every day or at least several times a week, that is if there will be some new signal there will be a message in (131) certain place, too.

Q. In other words, it is how you signaled somebody?
A. Yes.

Q. That is right. Now, did you—

The Court: What did you do in order to make a signal?

Mr. Tompkins: I beg your pardon?

The Court: What did you do in order to make a signal? That is what we want to know.

Q. What did you do, how did you make a signal? A. I made signals usually with colored chalk, mostly with blue chalk.

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Q. How did you use the chalk?

The Witness: I was using chalk that if there—

The Court: What did you do with it, my friend?

The Witness: I marked on that fence horizontally line. It meant that I have message for Soviet officials. And when I put vertical line it meant that I got a message from them.

By Mr. Tompkins:

Q. In other words, that signaled that you had (132) received the message? A. Yes, I received that message. That is, would be with the vertical line.

Q. Did you have an area, a signal area, from Soviet officials to you? A. Yes, I had and I picked up usually it myself.

Q. Where was that area? A. First one was in Brooklyn on New Utrecht Avenue and close to 46th Street. That is a small triangle with lamp post and just on—there is from that entrance to that triangle on your right, will be that signal area.

(A photograph was marked Government's Exhibit No. 9 for identification.)

Q. I show you Government's Exhibit 9 for identification. Can you tell us what that is? Do you recognize it?

(Counsel hands photograph to witness.)

A. (Witness examines photograph.)

This is that first signal place what I mentioned already before for Soviet officials to put signals for me, that I will check those signals—that they will put those signals themselves.

Q. Would you put a mark—

(133) The Court: And is that at New Utrecht Avenue close to 46th Street?

Reino Hayhanen, for Government—Direct.

The Witness: Yes, that is right.

(Witness marks on photograph.)

Mr. Tompkins: The Government offers it at this time, your Honor.

Mr. Donovan: Objected to. Same grounds.

The Court: Overruled.

(The photograph heretofore marked Government's Exhibit 9 for identification was marked and received in evidence.)

By Mr. Tompkins:

Q. Now did you have any other signal areas? A. Yes.

Then when I moved from Brooklyn to Newark, New Jersey, I had another signal place.

It was and it is on Market, on Pennsylvania Station, Newark, New Jersey, in Market Street exit, first and second platform.

Q. Was this a signal area from you to Soviet officials or Soviet officials to you? A. No. It was for Soviet officials to me, that they put signals. I was checking those signals.

Q. Soviet officials to you? (134) A. Yes.

Q. When did you establish this signal area? A. I established that signal area 1955 when I moved from Brooklyn to Newark, New Jersey.

(A photograph was marked Government's Exhibit No. 10 for identification.)

Q. Now I show you Government's Exhibit 10 for identification. Can you tell us what that is?

(Counsel hands photograph to witness.)

A. (Witness examines photograph.)

Like I mentioned before, this is that new signal area for me what—where Soviet officials put signals for me.

Reino Hayhanen, for Government—Direct.

And you can read even over here "To Market Street exit, / to Market Street downstairs."

Q. Can you mark with a pen upon the location? A. (Witness marks on photograph.)

Mr. Tompkins: I would like to offer that at this time, your Honor.

Mr. Donovan: Your Honor, in addition to the normal objection that I have been making, I respectfully point out the man says it was in 1955 when he moved from Brooklyn to Newark and it is the first I ever heard that he lived in Brooklyn, but now sometime in 1955, and I (135) respectfully suggest it is appropriate at this time that the man pinpoint the date more, and if he lived in Brooklyn—

The Court: Is that the objection?

Mr. Donovan: Yes, sir.

The Court: Overruled.

Mr. Donovan: I am objecting on those grounds.

The Court: Objection overruled.

By Mr. Tompkins:

Q. Did you use this signal area? A. That signal area I didn't use. Soviet officials did use it for me.

Q. Did you receive signals in the area? A. Yes, I did.

Q. Now, I think you mentioned this morning or early this afternoon that you communicated sometimes by code; is that correct? A. Yes, that is right.

Q. Where did you receive your code? A. Like I mentioned before, I received that code in Moscow, and I got special training for it.

The Court: Will you bear with me for a minute, please?

(136) Mr. Tompkins: Yes, sir.

The Court: Go ahead.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. Now, getting back, Mr. Hayhanen, to the time you received the instructions in Moscow and you had the conversation with Pavlov, did you subsequently return to Finland thereafter? A. Yes, I did.

And from Finland, then through Sweden and England I came to the United States of America.

Q. When did you arrive?

The Court: This was in 1952, was it?

The Witness: Yes, in Finland.

Q. What time of the year in 1952? A. It was 20th of October, 1952, when I arrived to New York City.

Q. Did you come alone, by yourself? A. Yes, I came alone.

Q. What did you have with you when you arrived in New York? A. I had, I mean, just personal things, and then I had with me one container in which I got just for check-up if I cannot remember my code, that my code was explained and photographed on film. It was on film.

(137) Q. And that was in a container with you when you arrived here? A. Yes.

Mr. Tompkins: Photographed. I think he used the word "photographed."

Q. Did you not?

(Whereupon the answer was read.)

Q. Now, did you follow the instructions that you have testified to that you got in Moscow and signaled your arrival? A. Yes, I did.

Q. How did you do that and where? A. First of all, I lived about one week—I was walking around and checking that nobody was following me, and I was checking it very carefully.

Reino Hayhanen, for Government—Direct.

Then when I noticed that nobody followed me I went to Central Park close to Tavern on the Green and I put white thumb tacks to that sign, and it meant that nobody is following me and I arrived all right to this country, there is no danger for me.

Q. Now, after you signaled your safe arrival, what did you do? A. Then I was just looking around and driving in New York City, and then I found other apartment for me (138) in Brooklyn.

Q. When you first came to the United States where did you live? A. First night I spent in Chesterfield Hotel.

Q. Is that in— A. In Manhattan on East 50th Street, I believe.

Q. Now, after the first night where did you live? A. Then after first night I found one furnished room in East 127th Street, Manhattan, close to Fifth Avenue, and there I lived about three or three and a half weeks; and from there I moved to Brooklyn, New York State.

Q. To where? A. To Brooklyn.

Q. To Brooklyn? A. New York State, yes.

Q. Whereabouts in Brooklyn did you first— A. In Brooklyn I found furnished room in 816 43rd Street, Brooklyn.

Q. How long did you live there? A. There I lived up to first or second of March, 1953.

Then from there I moved to South 4th Street, (139) Brooklyn.

Q. South 4th Street? A. Yes.

Q. How long did you live there? A. There I lived—South 4th Street, there I lived up to August the 1st, 1953—or was it August 31st? But it is one month difference, and I cannot recall exactly but—

Q. That is your best recollection— A. Yes.

Q. —is August, 1953? A. That is my best recollection.

Q. Where did you live after August, 1953? A. After August, 1953 up to Autumn—no, up to Spring, 1954 I lived 932 Madison Street, Brooklyn, New York State.

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Q. And after that where did you live? A. After that I lived in Peekskill.

Q. Now, you mentioned, I believe, that you had at some time moved to Newark? A. Yes.

Meanwhile, then, I moved to Newark 30th of April, 1955.

Q. Where did you live in Newark? A. In Newark I lived on 806 Bergen Street, Newark, (140) New Jersey.

Q. After you lived at 806 Bergen Street, Newark, New Jersey, where did you live? A. Then for a while, the winter months, I lived on Third Street and Orange Avenue.

Q. Orange Street? A. Orange Avenue.

Q. Orange Avenue? A. Yes.

Q. And Third Street? A. Yes, that's right.

Q. Where did you live after that? A. After that again I lived in Peekskill.

Q. Now, during the time you were in Newark did you maintain your home in Peekskill? A. Yes, I did.

Q. When did you buy that? A. I bought it May, 1954.

Q. So, despite the fact you had lived at these other addresses— A. Yes, I bought just summer home and during winter months I got to live in different places.

Q. But you kept the Peekskill home at all times? A. Yes. Oh, yes.

Q. Now, after you had signaled—I think you (141) testified you spent the first week walking around familiarizing yourself and then after that you signaled your safe arrival by putting the thumb tack in the board in Central Park; is that correct? A. That's right.

Q. After that did you communicate with anyone? A. Yes, I did.

Q. How did you communicate with them? A. I communicated through drop No. 1. It's Jerome Avenue and close to 165th Street.

Q. What did you say in that communication? A. In that communication I said that I arrived or that there is everything going okay with me, that I didn't notice any tailing.

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And then I asked for some money like I got instructions—oral instructions—in Moscow, that if I need some money I just have to write small notice I will get more money.

Q. Did you at this same time ask—make any other request in the message? A. Yes, I did. And I request that because there is no tailing behind me and nobody tails me I am ready to open some cover work, some place for cover.

And I got an answer that it is too early to (142) discuss that kind of matters.

Q. Now—

Mr. Donovan: Your Honor, could we have some testimony with respect to when he got such an answer, how he got it and so on rather than leave it in the record in this shape?

The Court: Don't you think you and I could both be patient and let Mr. Tompkins try his case?

I know he will be patient and let you conduct your cross examination.

(143) Mr. Donovan: I am trying to be very patient, your Honor.

By Mr. Tompkins:

Q. Now, would you fix a date, to the best of your recollection, when you sent this message? A. I sent that message in the end of November or first part of December, 1952.

Q. Was this through the Fort Tryon Park drop or Jerome Avenue? A. It was through Fort Tryon Park, from my best recollection.

Q. My recollection had been you said Jerome—drop No. 3 at Jerome Avenue.

Drop No. 3 is actually in Fort Tryon Park, isn't it? A. Yes, drop No. 3 is Fort Tryon Park, not Jerome Avenue.

Q. Jerome Avenue was drop No 1?

The Court: Which drop did you use for that first message?

Reino Hayhanen, for Government—Direct.

I think you have already testified on the subject.

The Witness: Let me see now, your Honor.

Mr. Donovan: He has testified both ways, (144) your Honor. I believe he has testified both ways.

The Witness: I can—

Mr. Tompkins: Wait a minute.

The Court: It is so hard to hear more than two people.

The Witness: After all, five years passed and—almost five years passed and I cannot remember exactly in which drop I put some certain message.

It could be drop No. 1, Jerome Avenue, or drop No. 3, Fort Tryon Park.

I am not so certain through which drop I sent that message, but the main thing is that I sent that message through drops.

Mr. Donovan: Objection, your Honor, to the testimony or any testimony as to the contents of the message unless the witness can identify in which drop he left it.

The Court: You know, that bus is a little bit louder than your voice, Mr. Donovan. I didn't hear you.

Mr. Donovan: I said, your Honor, that I object to the admission of the contents of any such message he has testified to under these cir- (145) cumstances where he cannot identify where he put such a message.

By Mr. Tompkins:

Q. Did you leave the—

The Court: He said it was either one or the other. The jury will know how to treat the testimony.

If there is an objection, it will be overruled.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. All right, I think, Mr. Hayhanen, you said that in a message which you sent through one of these drops you had pointed out in that message that you were trying to set up a cover? A. Yes, that is right.

Q. Will you explain what you mean by a cover? A. By cover I mean to open some small business. Suppose photography shop to take pictures but still just to show, for tax people, that I am doing this kind of work, I am paying taxes; but just to cover my main thing—my espionage work.

Q. I see. A. That is what I mean by cover.

Q. Now, you also testified that in a message you asked for money? (146) A. Yes, I did.

Q. Was that in the same message or in a different message? A. Yes, it was in the same message, and shortly after that message I got through Fort Tryon Park, drop No. 3, \$3,000 money.

Q. \$3,000 did you say? A. That's right.

Q. Now, did you send or receive this message in a code name of Vik? A. Usually I was sending code messages in my code name, Vik, or in some messages I just put plain V.

Q. Now, do you remember when you received this \$3,000 through the drop in Fort Tryon Park, about when, what time of the year? A. It was in December, 1952, before Christmas.

Q. Now, you recall—

The Court: That sum was \$3,000, was it?

Mr. Tompkins: \$3,000.

By Mr. Tompkins:

Q. You remember the denomination of the bills, Mr. Hayhanen? A. Most of bills, they have been \$20 bills with "L" letter, Los Angeles, and some of bills been \$10 (147) bills, but mostly they have been \$20 bills.

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Q. Now, do you recall a location at Fort Hamilton Park in Brooklyn around 45th Street? A. Yes. It's on New Utrecht Avenue and then 45th and 46th Street, they are crossing that New Utrecht Avenue, and there is that small triangle or that lamp post.

Q. And that would be the area you testified you established as a signal area? A. That's right.

Q. And which you have identified? A. Yes. That is what that is.

Q. Now, did you subsequently establish a signal area to take the place of that New Utrecht signal area? A. Yes. I found it myself and, like I explained in my message to Soviet officials, that it's that kind of place that I can check it several times every week.

Q. What was the reason that you changed it, if you had any reason for changing it? Was it convenience or— A. Pardon?

Q. Why did you change the area from New Utrecht Park to this new area you just described? A. To Newark, New Jersey?

(148) Q. No, not Newark, New Jersey.

You say, as I recall your testimony— A. Excuse me now. I misunderstood your question.

Q. All right. A. From that New Utrecht Avenue I changed that signal place to another one.

Then when I moved to South Fourth Street, Brooklyn, New York State, that McCarran Park, it is closer to that South Fourth Street than that New Utrecht Avenue.

That is why I found that another signal place close to that South Fourth Street, several blocks from South Fourth Street.

Q. Did you advise anybody of the new location? A. Yes. I send them a message.

Mr. Donovan: Objected to.

The Witness: I send a message that I found another apartment, and it is more convenient for me

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to change your signal place to McCarran Park. And I made some small diagram of it.

By Mr. Tompkins:

Q. I have here Government's Exhibit 11 for identification. Do you recognize it and, if so, can you tell us what it is?

(149) (Counsel hands photograph to witness.)

A. (Witness examines photograph.)

Yes, I do, and this is McCarran Park in Brooklyn, and that signal area was over here (indicating).

Q. Was the area for official people to communicate with you? A. Yes. That official—

Q. Or for you— A. —people had to put signals for me.

I was just checking if they had someone to meet me or if they had some message for me.

Mr. Tompkins: I would like to offer it in evidence at this time, your Honor.

Mr. Donovan: We would object, your Honor, on the same grounds.

The Court: Same ruling. Objection overruled.

(Photograph heretofore marked Government's Exhibit No. 11 for identification was marked and received in evidence.)

By Mr. Tompkins:

Q. Did you advise the Soviet officials of this signal area? Did you send them a message and advise them? (150)

A. Yes, and—

Mr. Donovan: Objected to as leading.

The Witness: —in the same message I explained that if this place is convenient for them to use as their signal place, or if it is not, then in the same—

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around the same place somewhere I asked them to find some other place.

That I got an answer that it's convenient for them to use as signal place for them.

And they put signals for me.

Q. And was it used thereafter? A. Yes, it was used.

Q. Now, some time after your arrival here in the United States did you have occasion to go to the Lincoln Road exit of the BMT Subway? A. Yes, I did.

Mr. Donovan: Objected to as leading.

The Witness: And—

By Mr. Tompkins:

Q. Will you tell us about the reason for— A. Yes. I will tell, and the reason was that I was, in 1952 in Moscow, I got instructions after arriving to New York City to go for visual meetings at Lincoln Road exit from Prospect Park BMT station, just at that (151) exit to stay over there for several minutes and/somebody will check that everything is okay with me.

That is the main purpose was, for that Lincoln Road, visual meetings.

Q. How often did you go? A. Once a month.

Q. On what date, if you recall? A. 21st of each month.

Q. How many months did you continue to do that? A. About three or four months.

Q. What did you wear, if you remember, at these visual meetings? A. I had to wear a blue tie with red strips, and I had to smoke a pipe.

The Court: Blue tie with red what?

The Witness: Stripes or strips, how it is.

Mr. Tompkins: Stripes.

The Court: Stripes?

The Witness: Yes, with red stripes.

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By Mr. Tompkins:

Q. I think you testified that you made——

The Court: You say you also smoked a pipe?

The Witness: Yes, but I do not smoke myself but I had to smoke that time.

(152) It was just like signals that——

By Mr. Tompkins:

Q. I think you testified you did this on several occasions? A. Yes, I did once a month.

Q. Did you receive any instructions after you had done it? A. Yes, Then I got written message through drop, and I got it through drop No. 3.

(153) And in that message it was said that I don't have to go any more for those visual meetings and next meeting place will be transferred to Keith's RKO Theatre in Flushing. It is end of Main Street.

And before future notice, that I don't have to go to that meeting place but when I will get a message that somebody likes to meet me, then I have to go to that RKO Theatre——

Q. In other words— A. —and meet in men's smoking room somebody and over there I had to smoke a pipe, too, and wear the same tie.

Q. Now, in February of 1953, did your wife join you in the United States? A. Yes, she did.

Q. Now, after you arrived in the United States did you meet Svirin? A. Yes, I met him.

Q. When did you meet—did you meet him on more than one occasion? A. I met him at least twice, what I remember.

Q. Now, would you tell us approximately when you first met him, how many months after you arrived, say? A. About seven months after I arrived. Seven or eight months.

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(154) Q. That would place it about the spring of 1953?

A. Wait a minute.

Q. Your best recollection? A. Yes, it was, from my best recollection, spring, 1953.

Q. All right. A. Because I came October. From October, three months. Yes, it was spring, 1953.

The Court: What was the second?

A. And second time was in July or August, 19... no. Excuse me, now. It was 1953.

By Mr. Tompkins:

Q. Was it the summer, the fall or— A. It was fall because it was raining, and I believe it was fall. It was raining that night, and I believe it was fall, 1953.

Or maybe it was in—could be even spring, 1954, because in springtime, there is raining, too.

But only thing what I remember about that night, that it was raining.

Q. Can you fix the date this way, to the best of your recollection: How many months after the first meeting? You say the first meeting was in the spring of 1953. How many months after that meeting, roughly, would you say you met Svirin the second time? (155) A. I cannot remember, for my best recollection.

Q. Now, how was the—I am just speaking now of the first meeting—how was the first meeting arranged? A. The first meeting was arranged that way, that I waited for Mr. Svirin at that Lincoln Road exit, and when he came, so we paid for subway—he arrived and we went to men's room and he gave me a message what he had with him, and he told that he likes to drive with me for several minutes in subway train.

Q. What I would like to ask you first, how was the meeting arranged? Did you receive a message to meet

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Svirin at the Lincoln Road exit? A. No. It was that way, that he came twenty-first of that month to meet me.

Q. I beg your pardon; I didn't— A. He came twenty-first of that month to meet me, like it was arranged—that it was arranged that twenty-first of each month I had to be on for visual meetings, and so he came to meet me.

Mr. Tompkins: Will you mark this for identification?

(Photograph was marked Government's Exhibit No. 12 for identification.)

By Mr. Tompkins:

(156) Q. I have here Government's Exhibit No. 12 for identification.

Can you examine the picture (counsel hands photograph to witness), and if you recognize it and know who it is, would you tell us who it is? A. Yes, I can—by the picture I can tell that this is picture of Mikhail Nicolai Svirin—the man whom I met in Moscow, 1952. But he usually wears glasses. Over here he is without glasses.

Mr. Tompkins: Thank you.

We would like to, if your Honor please, offer this in evidence at this time.

Mr. Donovan: Could I ask, your Honor, whether the Government is offering all of this in evidence, or simply the photograph which the witness has identified?

Mr. Tompkins: Through this witness we would be offering the photograph, your Honor, but we have a certificate here and we would be offering alternately the booklet, which is an identification card to show who Svirin is, number one, and, number two, to show that also he was a First Secretary of the U. S. S. R. delegation to the United Nations.

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In other words, that he was here on an official passport.

(157) The Court: This witness, of course, could not

Mr. Tompkins: He could not.

The Court: So that presently you are offering the photograph?

Mr. Tompkins: The photograph in the booklet, that is right.

The Court: It is a photograph in a certain booklet, but the photograph constitutes United States Exhibit 12?

Mr. Tompkins: Now, we, of course, can bring a representative from the United Nations to put in the whole booklet.

I am going to ask Mr. Donovan at this time if that is going to be necessary.

The Court: I think he will tell you that, so far as this witness is concerned, he doesn't regard it as competent to establish the authenticity of the book.

Mr. Donovan: That is true.

Mr. Tompkins: Correct.

I have no objection to that.

Mr. Donovan: No objection to the photograph, your Honor.

(The photograph above referred to and heretofore (158) marked Government's Exhibit No. 12 for identification was marked and received in evidence.)

Mr. Tompkins: What was the last question before we got into the identification of the photograph?

(Record read.)

By Mr. Tompkins:

Q. I think you testified that you went into the men's room of the Prospect Park station? A. That's right.

Reino Hayhanen, for Government—Direct:

Q. What happened down there? A. Like I explained before, he gave me one container and ~~one small package~~ with message and with photographed letters from my relatives.

Q. I see. A. From Russia.

Q. You had letters from your relatives and then a message, did you say? A. Yes.

Q. Do you remember what the message said, to the best of your recollection? A. To my best recollection that message said that I got May 1st greetings and that my family is all right and they hoped me success.

(159) The Court: And what?

Mr. Tompkins: They wished him success—hoped him success.

By Mr. Tompkins:

Q. Did anything further transpire outside of this receipt of these papers? Did you have a conversation? A. We been talking just briefly in subway station and, you know, there are other people so we been—we didn't talk about business at all and would be just talking that—about weather and so and so.

And then he, when we have been talking about five or ten minutes, when we have been driving by that subway, he told that then before getting next message I don't have to come for meetings or so and so; he has to meet me or somebody else, I will get a message.

The Court: What language did you speak when you talked to Svirin?

The Witness: Been talking English.

The Court: Talking English?

The Witness: Yes.

And then I left that subway train and he took another train on opposite direction and he, Mr. Svirin, was in the same train driving farther.

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By Mr. Tompkins:

(160) Q. In other words, he stayed on the train— A. Yes, he stayed on the train.

Q. —and you took a train— A. That's right.

Q. —going in the opposite direction? A. That's right.

Q. Isn't that it, as I understand it?

You mentioned a second meeting with Svirin. Now, you recall what happened at that meeting? A. At that meeting, I got some letters from my relatives and, like I mentioned before, it was a rainy evening and we didn't talk much because it was—

The Court: Where did it take place—the second meeting?

The Witness: The second meeting, it was taking the place on that—they call it Ocean Parkway or is it Ocean Avenue, in Brooklyn, New York State. I cannot remember exactly, but it is first corner from Lincoln Road, from that Lincoln Road exit when you turn to the right.

That street what is crossing before entering Prospect Park.

I think it is Ocean Parkway. That place is Ocean Parkway, not Ocean Avenue, because Ocean Avenue is further down in Brooklyn.

The Court: So you had a conversation with him?

The Witness: Yes.

The Court: In the vicinity of Ocean Parkway and Prospect Park?

The Witness: Yes, that is right.

And we have been talking briefly, just that told that everything is going all right, and he told greetings from everyone whom I know; and he gave me those letters in soft film from my relatives; and then he told that now there will be some new arrangements and I will get a message later, like I got it, too, that I don't have to go to that meeting place, and that

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meeting place will be transferred to RKO Keith's Theatre in Flushing.

By Mr. Tompkins:

Q. Did you see Svirin after that? A. No, I never saw him after that.

Q. In other words, from that meeting until now you haven't seen him? A. That's right.

Mr. Donovan: Pardon me, your Honor. Couldn't we at least know what year this happened in?

By Mr. Tompkins:

(162) Q. Give us the year to the best of your recollection? As I recall, you said that you had your first meeting with him some time in the spring of 1953? A. Yes, and the year will be in end of 1954 or beginning of 1955.

Q. It would be two years? A. No. Excuse me.

Now, I am sorry. It would be end of 1954—autumn of 1954.

Q. Can you give it to us in months after the first meeting—just your best recollection? A. Like I explained, about four—six months passed after that.

Q. If your first meeting was in the spring of 1953, and this was six months— A. This would be 1953, the same year.

Q. The same year, all right.

Mr. Hayhanen, do you know an individual by the name of Asko? A. Yes, I know.

Q. Do you know his full name? A. No, I don't.

Q. You know him only as Asko? A. Pardon me?

(163) The Court: How do you spell that?

Mr. Tompkins: A-S-K-O.

By Mr. Tompkins:

Q. Am I correct? A. That's right, A-S-K-O.

I know him by the nickname as I know Mark, too, by the nickname. I don't know his real name.

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Q. Do you know who Asko is? A. Yes, I know. He is Finnish sailor.

Q. He is a Finnish sailor. How did you first come to meet him? A. I got a message from Moscow that I will get a courier through whom I will send some messages to Moscow; and I had to meet him in Brooklyn on Flatbush Avenue.

(164) Q. When you say you got a message from Moscow— A. Yes.

Q. —will you explain what you mean? Was it through a drop, was it by radio, or was it through some other individual? A. What I mean about getting messages, I mean just only to get them through drops because I haven't got any radio transmissions or any radio contact; and I was just getting those messages through drops.

Q. In other words, what you mean is you got a message through a drop? A. Yes.

Q. And these were instructions from Moscow? A. That's right.

Q. Were you instructed to meet him? A. Yes, close to Seventh Avenue exit B M T, Brighton Line. It is on Flatbush Avenue, but I cannot remember exactly that movie theatre's name right now, but I can find it if necessary.

Q. Do you remember about the time—I am now speaking about date generally—when you first got these instructions from Moscow? When did you first see Asko? Maybe that will help you. A. I saw him first in spring, 1953.

(165) Q. Spring of 1953. Now, you described him as a courier, I believe. A. That's right.

Q. What did he bring as a courier, if you remember? A. Mostly he brought me some pencils or pens or some coins in which I got some messages from my relatives or some messages from my bosses.

Q. How many times would you say that you met Asko? A. I met him several times and usually he was coming and that ship is coming to this country about once or once in one and a half months or sometimes little bit—sometimes

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three times in four months. It depends what kind of cargo they are bringing to this country or taking from this country.

Q. Now, did you have a— A. Because it is cargo ship.

Q. Excuse me.

Now, how did you communicate with Asko? Through drops? A. That's right, and by previous agreement that way, that by newspapers I can check when that ship arrived, and on next day when that ship will arrive that I (166) will go to that meeting place; if Asko can come, so he will come to meet me or otherwise through a signal place what we got with Asko, too, like we got with official people, but in different places.

Q. In other words, do I understand you to say you had drops with Asko? A. Yes.

Q. That you had signal areas? A. Signals places, too.

Q. And you had a meeting place? A. That's right.

Q. Would you just give us the location of the meeting place? A. Mainly would be meeting with Asko—it is from 72nd Street when you are going to Hudson—toward Hudson River—and when you will cross that bridge, that highway bridge on that river side—in that river side park.

Q. What was the location?!

You mentioned you had a signal area between you and Asko. Where was that signal area located? A. First it was located on Amsterdam Avenue in Tuk's or Duk's.

Q. T-u-k? (167) A. T-u-k Bar, in phone booth.

Q. In the phone booth of the Tuk's Bar? A. Yes, under that seat. But then—

(169) Now, Mr. Hayhanen, at the close of yesterday's session, I had commenced asking you some questions about Asko. I believe you said that you knew him. I believe you testified that you had drops with Asko, that you had signal areas, and that you had a meeting place with Asko. And I asked you would give us the location of the meeting place, and your answer was:

Reino Hayhanen, for Government—Direct.

"Mainly would be meeting with Asko—it is from 72nd Street when you are going to Hudson—toward Hudson River—and when you will cross that bridge, (170) that Highway bridge on that Riverside—in that Riverside Park."

Is that where you first met Asko? A. Yes. That is the first meeting place with Asko.

Then when Asko was coming with ship to Brooklyn, we transferred meeting place in Brooklyn on Third Avenue and 58th Street corner in bar where we were meeting.

Q. And that became your regular meeting place? A. Yes.

Q. Now, you also testified, just at the close of the day yesterday, you mentioned you had a signal area, and I asked you where that was located.

You said first it was located on Amsterdam Avenue in Tuk's or Duk's— A. Tuk's.

Q. What was that? A. That is bar.

Q. Where was the— A. On the corner of 79th Street and Amsterdam Avenue.

Q. Where in the bar was the signal area located? A. It was in phone booth under the seat.

The Court: "In phone booth" what?

Mr. Tompkins: Under the seat.

The Witness: Under the seat in phone booth.

(171) By Mr. Tompkins:

Q. Now, did you continue to use the signal area in Tuk's bar? A. I used it with Asko as long as he was coming with ship to Hoboken, but then when we moved place for meeting to Brooklyn, we also transferred signal place to Brooklyn.

Q. Where did you locate your new signal area then? A. The signal area was on the corner of 58th Street and 4th Avenue in the bar.

Reino Hayhanen, for Government—Direct.

Q. Do you know the name of the bar? A. For my best recollection that name is Brand's Bar.

Q. Brand's? A. Yes.

Q. B-R-A-N-D-'S Bar? A. That's right.

Q. Was the signal area inside of Brand's Bar? A. Yes, sir.

Mr. Donovan: Objection.

The Witness: It was in men's room in Brand's Bar.

Q. Will you describe it particularly, if you will, please? A. It was—there is middle wall. But that wall, with thumb-tack we usually put signals over there on piece of (172) paper.

Q. Now, did you explain this location with particularity or—

Strike that out.

Did you explain this location to the F. B. I.? A. Yes, I did.

Q. Now, you set up this signal area in Brand's Bar? A. I did.

Q. And did you use it? A. Yes.

Q. Do you know whether Asko used it? A. Yes, he was using it, too.

Q. Now, you have testified that you had drops that you used with Asko; is that correct? A. That's right.

Q. Would you tell us the location of those drops? A. The last drops with Asko—for Asko I found two of them in Brooklyn.

They been located one in Barry's Bar on 4th Avenue and, I believe; it is between 44th and 45th Street.

Q. And where was the other? A. It is— And another one was in Sunset Park. It is on 5th Avenue and 44th Street corner.

Q. Did you have, prior to that time, any drops with (173) Asko? A. Yes. I had them on Riverside, in Riverside Park.

Reino Hayhanen, for Government—Direct.

Q. Will you tell us— A. One was—

Q. Can you tell us where the first one was located? A. First one was located, from that first meeting place if you go to Hudson Riverside and pass men's toilet, then turn to the right, there are stairs, and in the middle of stairs there is lamp post. Under that lamp post was drop No. 1.

And drop No. 2 was at—

Q. Just a minute. Can you tell us about what street? Riverside Drive and— A. It is around 74th Street, I guess.

Q. I have here Government's Exhibit No. 13, for identification. Do you recognize it and, if so, can you tell us what it is? (Counsel hands photographs to witness.)

A. (Witness examines photographs.)

Yes, this is that drop No. 1 for Asko, what was on Riverside, in Riverside Park.

Q. Did you use that drop at all? A. Yes.

Q. Who set it up? A. Asko got this from Soviet official.

(174) Q. Can you mark on there the location with a pen, again, please? A. (Witness marks on photograph.)

Mr. Tompkins: I would like to offer this in evidence, Mr. Donovan.

Mr. Donovan: Defense would not object to the photographs, your Honor, but I ask that the answer of the witness as to who set up this drop be stricken from the record on the ground that it is not within his knowledge.

By Mr. Tompkins:

Q. Well, do you know who set it up?

Mr. Donovan: Could we have the question and answer read, your Honor?

The Court: Yes. I heard the answer. He said that Asko suggested it and that he was instructed by the Soviet officials. I think that that is what he said.

The Witness: That is right.

Reino Hayhanen, for Government—Direct.

Mr. Donovan: I renew my objection, your Honor.

The Court: You consent that so much of the answer be—

Mr. Tompkins: I do, your Honor.

The Court: —be stricken.

(175) Mr. Tompkins: There is no objection to the photo, then, I understand.

The Court: Received.

Exhibit 13 for identification received.

(Photographs marked Government's Exhibit No. 13 for identification were marked and received in evidence.)

Mr. Donovan: It is understood, Mr. Tompkins may have a continuing objection to all these with respect to materiality. In other words, that—

The Court: I didn't hear.

Mr. Donovan: I said, your Honor, it is understood, in our talk yesterday, that I have a continuing objection to all these on the ground of materiality, and I am renewing that objection. Otherwise there is no objection.

The Court: All right.

Mr. Tompkins: This is the first objection I have heard on materiality, your Honor. I think Mr. Donovan is entitled to it.

The Court: I think Mr. Donovan said something to that effect yesterday generally. I am not sure, but I think so.

Mr. Donovan: Yes, your Honor; the transcript (176) will show it.

By Mr. Tompkins:

Q. I have here Government's Exhibit No. 14, for identification. Will you examine that? If you recognize it, tell us what it is. (Counsel hands photographs to witness.)

A. (Witness examines photographs.)

This was the Drop No. 2 for Asko.

Reino Hayhanen, for Government—Direct.

Q. Where was it located? A. It is located around 80th Street and in Riverside Park.

The Court: Just a minute. I think the record is not clear.

I understood the witness to testify that the second Asko drop was at Sunset Park.

The Witness: Yes, the last drop.

Mr. Tompkins: That was the second drop that replaced—in other words, there were two original drops, your Honor, that the witness has testified to, and two drops that replaced the original drops.

He has testified to the replacements. He is now testifying as to the original drops.

The Court: Where do you say this drop was?

The Witness: It was in Riverside Park around (177) 80th Street, and under lamp post No. 8113.

By Mr. Tompkins:

Q. Did you use this drop? A. Yes, we used it with Asko.

Q. Who set it up, if you know? A. I did.

Q. Was it used by Asko? A. Yes.

Mr. Donovan: Objection, your Honor.

Mr. Tompkins: If he knows he certainly can testify, I think.

The Court: If he was in communication with Asko, then he is stating that he received messages from Asko at that drop. I think that is competent.

By Mr. Tompkins:

Q. In respect to the four drops that you have testified to, Mr. Hayhanen, the two replacements and the two originals— A. That's right.

Q. Did you use all four of those? A. Only three of them. In Sunset Park we didn't use that drop.

Q. Neither of you used it? (178) A. No.

Reino Hayhanen, for Government—Direct.

Q. Is that right? A. In Sunset Park, we didn't use that new drop No. 2.

Q. As to the other three— A. Yes.

Q. —did you use them? A. Yes, sir, we used them. I used and Asko used.

Q. In other words, you got messages from Asko? A. Yes, and I was sending messages through this.

Q. Will you please mark the location there in pen, and I then offer it? A. (Witness marks on photograph.)

(179) (Mr. Tompkins exhibited photograph to Mr. Donovan.)

Mr. Donovan: Same objection, your Honor.

The Clerk: Exhibit 14.

(Photograph marked Government's Exhibit No. 14 in evidence.)

By Mr. Tompkins:

Q. Now, yesterday, I believe you also testified that Asko delivered some papers to you. Is that correct? A. Yes, Sir.

Asko brought me some messages or some letters from my relatives.

Q. Asko, did he ever deliver anything to you for Mark? A. Yes, sir, several times, he would deliver for Mark personal letters from his family.

Q. Now, did you receive at any time any instructions—

Mr. Donovan: Objected to as leading, your Honor.

The Court: Well, it may not be if you let him finish the question.

By Mr. Tompkins:

(180) Q. —from official people?

Mr. Donovan: Objection, your Honor.

The Court: I am sorry, I don't know what that means.

Reino Hayhanen, for Government—Direct.

Q. Did you at any time receive any instructions concerning Asko through drops?

Mr. Donovan: Objected to.

The Court: I will allow that.

A. Yes, I got.

Q. What were those instructions? A. I got instructions to check Asko, and it was in checking that way that Asko brought pen as a container and I got orders not to open it and send back to Moscow through Asko that they can check it was it opened or not.

Mr. Donovan: Objection, your Honor, and ask that the answer be stricken from the record.

Mr. Tompkins: I think the answer was perfectly responsive. I asked him what his instructions were and he testified to that.

Mr. Donovan: There is nothing in the record to show when this happened, where it happened, whether the instructions were oral or written or any of these other basic things which would make this testimony material.

(181) The Court: I suppose you could develop the details.

Mr. Tompkins: I asked the question, whether he received instructions through drops.

They certainly couldn't be oral through drops, your Honor.

By Mr. Tompkins:

Q. Were they written instructions? A. Yes, and those instructions Mark got too about checking Asko.

Mr. Donovan: Objection, your Honor.

The Witness: In the meeting with Mark—

The Court: Just a moment.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. Just a moment. Did you have a conversation with Mark relating to Asko? A. Yes, sir.

Q. Will you tell us about that conversation? A. Mark told me that he got a message or instructions about checking Asko, next time when Asko arrived to New York City he would bring a pen, and I have to take that pen and before Asko leaves for Finland, that I have to return this same pen for Asko.

(182) Mr. Donovan: Your Honor, I ask that the answer be stricken unless it is identified with respect to this conversation as to when and where it took place.

Mr. Tompkins: If I could only try my own case, your Honor, I would develop that.

I think I am entitled to develop it my own way and not Mr. Donovan's way.

Mr. Donovan: Your Honor, I have been extremely patient in accordance with your request yesterday.

He is not only trying his own case, he is his own witness—

Mr. Tompkins: That is ridiculous.

Mr. Donovan: I have not objected to questions as to form, I have been very careful to objecting to those that are leading; on the other hand with respect to vague testimony, at this time, with respect to whether he had a conversation, we don't know when it was, where it was.

I simply wanted the record to note that.

The Court: Your objection is noted.

I think the conversation he had with Mark is admissible in evidence.

By Mr. Tompkins:

(183) Q. Do you recall, Mr. Hayhanen, when you had this conversation with Mark, to your best recollection?

Reino Hayhanen, for Government—Direct.

A. That conversation was in the first part of 1955, before Mark left for Moscow.

The Court: And where was it?

The Witness: We have been driving in the car and we been talking about this.

The Court: You were driving in a car?

The Witness: Yes, with Mark.

Mr. Donovan: Your Honor, I ask that that part of his answer be stricken which says before Mark left for Moscow.

Mr. Tompkins: I think he is fixing a date, this is what Mr. Donovan is asking for.

Mr. Donovan: He fixed the date in the first portion of his answer, and I ask that that portion be stricken—

The Court: Denied.

By Mr. Tompkins:

Q. Mr. Hayhanen, when did you first meet the defendant Mark? A. First I met him in men's smoking room in RKO Keith's Theatre in Flushing.

Q. Will you fix a date, if you can, approximately? (184)
A. It was July or August, 1954.

Q. Now, will you tell us about that first meeting? How was it brought about? A. I got instructions, short message from Soviet officials through drop and there was that somebody wants to meet me, so like I testified yesterday that meeting place was transferred to that RKO Keith Theatre. So I went to that theatre that date, in the evening when it was in message, the date and time between eight or nine o'clock in the evening.

Mr. Donovan: Objection.

Mr. Tompkins: Just a moment. There is an objection.

Mr. Donovan: I object, your Honor, and ask that the answer be stricken.

Reino Hayhanen, for Government—Direct.

There has been nothing stated with respect to whether these instructions were oral or written, and no description of what he keeps referring to as "Soviet officials." They should be identified.

Mr. Tompkins: He said that he got instructions through a drop.

The Court: That is what he testified to and I propose to let his testimony stand subject to a motion to strike if not connected.

(185) Mr. Tompkins: Would you give the witness the last few words so he can take up where he was interrupted, please?

(The court reporter thereupon read the last few words of the last answer given by the witness.)

The Witness: Yes. And I went to that men's smoking room wearing that blue tie with red stripes, and was smoking a pipe.

Then, Mark came and he then told, let's go out and we been talking outside of the theatre. We been walking in Flushing.

Then we went to one—

By Mr. Tompkins:

Q. Just a minute. If I may ask you this, you say you were wearing the blue tie with the red stripes? A. That is right.

Q. Did you recognize Mark? A. No, I didn't know Mark; but he recognized me by that blue tie and that I was smoking a pipe, and there was nobody in that men's smoking room, nobody else.

Q. Did you have a conversation when you first met him immediately? A. Mark should ask me pass words, but he didn't ask because he told that I know for sure whom he has to meet.

(186) Q. What did he first say to you? A. He should tell me pass words.

Reino Hayhanen, for Government—Direct.

Q. I don't think you understood the question. What did he actually say to you when you met him? A. Actually, after greetings he told, let's go outside and we walk and we will talk outside of the movie theatre.

The Court: What did he say in greetings, is what we want to know? What was the first thing he said to you?

The Witness: Hello, then he told me that never mind about pass words, that I know that you are right man.

By Mr. Tompkins:

Q. In other words, as I understood you to say, he said, "Let's go outside"? A. Yes.

Q. Did you go outside? A. Yes, we been walking and then we went about three or four blocks from that movie theatre to restaurant where we been drinking coffee.

Q. Did you have a conversation with him in the restaurant? A. Yes, sir.

Q. Would you tell us about that conversation? (187)
A. During that conversation Mark told that he got message that I arrived to New York City long ago, but he was surprised that so long it took that he got orders to meet me or to have this conversation.

Then, he explained that he was in this country already several years.

What else it was? Let me see.

Then, he asked if I had cover work.

I explained that I didn't have yet, and he told that we have to think about it because otherwise it will be difficult with time, because if I work somewhere, eight hours a day, I won't have enough time for espionage work.

Q. Now, you used the term cover work? A. Yes.

Q. Would you explain that to the Court and jury? A. By cover work I mean that kind of work that to show that I am earning money from that work and like later, then, we decided about opening photo studio.

Reino Hayhanen, for Government—Direct.

Q. All right.

Now, at this first meeting, did Mark tell you where he lived? A. No.

Q. Did he tell you where he—whether he worked or not? (188) A. Not in the first meeting.

Then, later, in later meetings he told that he has some small shop somewhere in Brooklyn.

Mr. Donovan: Objection.

The Court: Did he say what kind of a shop?

The Witness: He told that small shop, but he **didn't explain it more carefully or in more detail.**

Then, later, he told that he has storage place in Brooklyn, storage room for his equipment and what he has, and other things.

Mr. Donovan: Do I understand it to be this witness' testimony that all of this was told at this meeting? This first meeting?

The Court: No.

He said that it was a later meeting, Mr. Donovan.

Mr. Donovan: He has never identified the time or place of those meetings.

The Court: You know what cross-examination is, don't you?

You are an experienced lawyer.

Mr. Donovan: Your Honor, I also know when objections should be made to incompetent testimony.

The Court: All right.

(189)•Your objection is noted, and it is overruled.

Q. Do you recall when the defendant Mark told you—

The Court: Do you mind if I interrupt?

Mr. Tompkins: No, sir.

The Court: Would it be convenient to ask the witness to indicate the spread of time, the lapse of time during which these several meetings took place?

Mr. Tompkins: That is what I was starting to do.

Reino Hayhanen, for Government—Direct.

I was going to ask him if he remembered when Mark told him of the location of this storage room.

The Witness: Mark told about location of his storage room in 1955 when I moved to Newark, New Jersey; and I found there one store with apartment and we decided to open photo studio for me, like cover work, like photo studio.

By Mr. Tompkins:

Q. That was in 1955? A. That is right.

Q. Now, did you ever visit the storage room? A. Yes, I did, once.

Q. Will you tell us approximately when? A. It was in May, 1955.

(190) Q. All right. A. And one evening Mark told that he has some photo equipment to give me and let's go and take them from storage room.

So we came to Fulton Street, 252, on fourth or fifth floor, it was located that his storage room.

Q. Now, did you, you have testified now to the visit to the storage room.

Did you ever on other occasions go to 252 Fulton Street? A. Yes, then two times I came to the same place, but Mark already brought down stairs some photo equipment, some more photo equipment, and I took them to the car, that photo equipment with Mark, and I took it to Newark, New Jersey.

Q. Now, in addition to this photo equipment—

Mr. Donovan: Pardon me.

Could we have the time of these visits established?

The Court: Well, he gave you the month of May, 1955.

I suppose he couldn't give you the precise day.

Mr. Donovan: No, I didn't want the precise day, your Honor.

Reino Hayhanen, for Government—Direct.

Do I understand, then, that all of these visits (191) that he is speaking of occurred in May of 1955?

The Court: I don't think he has so testified, Mr. Donovan.

By Mr. Tompkins:

Q. Will you give us an approximate date?

Mr. Tompkins: Your Honor, I want to say this, I don't know how I can ask him the date and an incident in the same question; but each time he testifies to an incident we get the same objection, on date.

If I ask him the date and incident, I am going to have an objection.

(192) Mr. Donovan: There is a way to do it, your Honor.

Q. You say you went to the studio several times? A. Not studio, but storage room.

Q. You went to the storage room once, is that correct? A. Yes.

Q. Then you went to the vicinity of 252 Fulton Street, in front of 252 Fulton Street, on a couple of occasions? A. Yes.

Q. Will you give us roughly your best estimate of when that occurred? A. All those three occasions, they happened in May, 1955, and the first time when I was first and only time, when I was in that storage room, it was beginning of May, 1955, and those two occasions, then, they been later; maybe one week later was the next one, and then several days later was that second time when I came just to that door, 1955.

Q. Now, in addition to the photograph supplies that you said you picked up, did you pick up anything else at 252 Fulton Street from Mark? A. Yes. I picked up also radio.

Q. What kind of a radio? (193) A. Short-wave radio.

Q. Who gave you the radio? A. Mark did.

Reino Hayhanen, for Government—Direct.

Q. Now, did Mark at any time tell you where he lived?

A. No, he never told where he lived exactly; but he mentioned that he lives, lived in several occasions in hotels.

Q. All right.

Now— A. Then, excuse me—Once when we been driving in Manhattan, he explained it was around 95th or 97th Street, and close to Broadway, he showed the house that he told several years ago he lived in that house.

Q. Did you receive a salary for your work in the United States? A. Yes, I did.

Q. Now, up to 1954, when you first met Mark, how was your salary paid? A. I was getting salary through drops.

Q. And after you met Mark how was your salary paid?

A. After I met Mark then Mark was giving me my salary.

Q. Now, at the time that you testified that Mark gave you a short-wave radio, at the time that he gave it (194) to you did you have a conversation with him? A. Yes, and the reason he gave me the short-wave radio was that we went to—

Mr. Donovan: Objection, your Honor.

The Court: Tell us the conversation, please.

By Mr. Tompkins:

Q. Tell us the conversation. A. Conversation was that he has to locate some place from where he can get radio messages by that radio and then we took a trip to Croton Reservoir on Highway 129, about 100 yards from the bridge, reservoir bridge.

Q. With the short-wave radio? A. Yes.

Q. And when you arrived at the Croton Reservoir, what did you do, if anything? A. Then Mark put antenna to that radio and he tried to get some, just to listen that it is possible to listen by that radio some other stations, short-wave stations; but I don't know, maybe fuse was burned or something happened that he couldn't listen, and after that he told me that I may as well have that radio in my apartment because he has another radio.

Reino Hayhanen, for Government—Direct.

Q. Now, you are in Croton Reservoir. Were you in an automobile? (195) A. Yes.

Q. How did Mark try to receive? Did he plug it in or— A. We got converter from six volts to one hundred ten volts and we plug in the converter to cigarette lighter in the car.

Mr. Donovan: Could we know when this is supposed to have taken place?

The Court: I didn't hear you.

Mr. Tompkins: Mr. Donovan wanted to know when.

Q. Could you tell us about the approximate time that this took place? A. That happened in the end of May, 1955, or in first days of June, 1955, before Mark went to Moscow.

Mr. Donovan: Objection, your Honor, with respect to the last part of his reply.

The Court: Well, the jury understands that the witness means that it was before he, the witness, understood that Mark went to Moscow.

The witness isn't trying to testify to the fact. He is trying to fix a time.

Mr. Donovan: Your Honor, could I ask whether or not this is supposed to have occurred at or near the bridge which was testified to yesterday?

(195-A) The Court: I would prefer that you reserve your questions for cross examination, if you please.

Mr. Donovan: Yes, your Honor.

(196) By Mr. Tompkins:

Q. Now, Mr. Hayhanen, in your testimony you have referred on a couple of occasions, in attempting to fix a date—you have used the phrase "before Mark went to Moscow."

Reino Hayhanen, for Government—Direct.

Do you know whether Mark did go to Moscow?

Did you ever have a conversation with him about it, let's put it that way? A. Yes. We had several conversations about his trip to Moscow, and he went for Moscow, from my best recollection, 10th of June, 1955.

Q. Now, you had conversations with Mark? A. Yes.

Q. Did he tell you he was going to Moscow? A. Yes. He was tell me many times about it because usually we would be meeting once or twice a week.

Q. Do you know how he went to Moscow? Boat or train or what method of conveyance?

Mr. Donovan: Objection.

The Court: Well, if the witness saw Mark off, he could say that he saw him leave by a certain method of transportation.

I don't know that he isn't going to.

Mr. Donovan: Unless he saw Mark on a non-stop (197) flight to Moscow, I don't know how he could testify that Mark went to Moscow.

Mr. Tompkins: I will withdraw the question.

By Mr. Tompkins:

Q. Did Mark tell you how he was going to Moscow?

A. Yes, he did.

He told me that he has to go through Austria, and then when he came back from Moscow and we met again he explained to me first he took a plane to Paris; from Paris by train he went to Austria; and from Austria—then I cannot remember exactly how he went from Austria.

Q. Now getting back to the time that you first met him, Mr. Hayhanen, did you have subsequent meetings with Mark? A. I didn't understand your question.

Q. Did you meet with him subsequently? A. Yes. I was meeting him once or twice a week.

Q. Now, do you know whether Mark had any drops? A. Yes. I know that he had several drops.

Reino Hayhanen, for Government—Direct.

Q. Will you tell us the location of those drops? A. His drop No. 4 and drop No. 7, they been located at 95th Street in front to Henry Hudson Parkway and Riverside Park.

Q. Is that two drops now? (198) A. Yes.

Q. No. 4 and No. 7? A. No. 4 and No. 7.

Q. Did you ever visit those drops with Mark? A. Yes, we did several times.

The Court: Just for the sake of accuracy, can we agree that the witness, when he speaks of 95th Street and the Henry Hudson Parkway, means the West Side Drive?

The Henry Hudson Parkway doesn't begin at 95th Street, does it?

Mr. Tompkins: No. He was testifying as to two, as I understood him. One drop was on 95th Street.

By Mr. Tompkins:

Q. Am I right? A. They both are close to that 95th Street. When from 95th Street you are going to downtown—downtown lanes—

The Court: I am talking about this: Does the Henry Hudson Parkway begin as low as 95th Street?

Mr. Donovan: No, your Honor, and the Croton Reservoir is up in Westchester.

Mr. Tompkins: We are not talking about the Croton Reservoir. I haven't heard any testimony (199) about the Croton Reservoir.

The Court: No. We are talking about the correct designation; that's all.

If it can be agreed he is talking about 95th Street and the West Side Drive, well and good. If it cannot, we will pass on.

Mr. Tompkins: Well, I had rather have the witness tell us, your Honor. Frankly I am not too familiar with the territory.

Reino Hayhanen, for Government—Direct.

The Court: He is speaking of 95th Street. 95th Street and what precisely?

The Witness: 95th Street and West Side Drive.

I cannot remember exactly that name of that, but it is West Side.

By Mr. Tompkins:

Q. Does it go along the river? Is that what you are—

A. Yes, along the Hudson River, that driveway is.

Mr. Tompkins: Will you mark this?

(Photograph was marked Government's Exhibit No. 15 for identification.)

By Mr. Tompkins:

Q. I show you Government's Exhibit 15 for identification.

(200) (Counsel hands photograph to witness.)

Do you recognize that picture and, if so, can you tell us what it is? A: (Witness examines photograph.)

This was Mark's drop No. 4.

Q. Will you put a mark on it, please? A: (Witness marks on photograph.)

Q. Did you ever see Mark use this drop? A. Yes. This drop was for magnetic containers.

Mr. Tompkins: I will offer it.

Mr. Donovan: Same objection.

The Clerk: 15.

The Court: I don't know whether you are objecting or not. Are you objecting to the photograph?

Mr. Donovan: I am, your Honor.

The Court: On what ground, please?

Mr. Donovan: On the ground as to materiality, and there has been no identification as to when these meetings did occur.

The Court: Overruled.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. Did I understand you to say that you had gone to this drop with Mark? (201) A. Yes.

Q. And that you saw him use it? A. Yes.

Q. Was that your last answer? A. Yes.

Q. Do you recall whether you went to this drop with Mark before June, 1955 or afterwards? A. Before June.

Q. In other words, before he went to Moscow? A. Yes.

Q. Now, do you know the location of any other drops that Mark had? A. Yes. I know the location of, like I mentioned before, I know location of drop No. 7.

Q. All right. A. It's in the same vicinity.

The Court: Do I understand Exhibit 15 is Mark's drop No. 4?

Mr. Tompkins: That is correct, your Honor.

(Photograph heretofore marked Government's Exhibit No. 15 for identification now was marked and received in evidence.)

By Mr. Tompkins:

Q. I have here Government's Exhibit 16 for identification. (202) Will you examine that and if you know what it is, tell us what it is, please?

(Counsel hands photograph to witness.)

A. (Witness examines photograph.)

This is Mark's drop No. 7.

Q. Will you put a mark on it and show its location?

A. (Witness marks on photograph.)

This drop was for magnetic containers, too.

Q. Have you ever visited that drop? A. Yes.

Q. Were you with—was the defendant, Mark, present?

A. Yes, he was.

Q. Do you know or did you ever see him use that drop?

A. I didn't see him use it, but he showed me where it is located.

Reino Hayhanen, for Government—Direct.

Q. In other words, Mark pointed out the location of the drop to you? A. Yes.

Mr. Tompkins: I will offer it in evidence.

By Mr. Tompkins:

Q. When did you—

Mr. Donovan: Same objection.

(203) The Court: Same ruling.

(Photograph marked Government's Exhibit No. 16 for identification was marked and received in evidence.)

By Mr. Tompkins:

Q. When did you visit this drop with Mark, approximately? A. It was, from my best recollection, it was in April, 1955.

Q. In addition to drops 4 and 7 which you testified to, do you know whether Mark had any other drops? A. Yes. I know he had drop No. 6 on Riverside Drive around 104th Street, I believe.

Q. What type of drop was that? A. It was for thumb tacks on the bench.

Q. Would you describe it just a little more, please? A. There are benches for public and underneath—if you sit down to that bench to right side, so on the bench, in the middle—of that middle—how do you call it—middle bolt of bench, under that Mark put thumb tack. He—

Q. You mean the middle— A. Yes. He showed me. Once he put message over there, and he showed how he is using it.

Q. When you say middle bolt, you mean the wooden (204) slat? A. Yes.

The Court: Is this 104th Street or 94th Street?

Mr. Tompkins: 104th, I believe the witness said.

The Witness: Yes. From my best recollection that is 104th.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. And you say that Mark pointed this— A. Yes.

Q. —drop out to you? A. That's right.

Q. Did you and he visit the drop together? A. Yes. He had a message to send to Soviet officials, and he told that we have to drive over there, that he put thumb tack.

Q. Now, do you know the location of any other drop that the defendant had? A. Then he had one drop in Central Park West, what we called walking drop. It means that he could put that—drop was that way, that he could put under mail box magnetic container from 74th Street up to 79th Street, as I remember. That—

(205) Q. Would you explain what you mean by a walking— A. He met that way, and he explained that he can use—suppose one time 74th Street corner mail box and the second time he can use 76th Street or 77th Street corner mail box and Central Park West.

Q. Was this walking drop used in connection with a signal area? A. No. It was with connection to send messages for Soviet officials. Mark used it.

Mr. Donovan: Objection, your Honor.

The Court: He can state anything that Mark told him on the subject.

Mr. Donovan: He hasn't. He hasn't testified thus, your Honor.

By Mr. Tompkins:

Q. Did you have a conversation with Mark about the walking bank? A. Yes.

Q. What did he say to you about the walking bank? Will you tell us everything he said to you, to the best of your recollection?

Did he say what it was going to be?

A. Yes.

Reino Hayhanen, for Government—Direct.

Q. Used for? (206) A. Once he gave me a magnetic container and he told that I have to put it in the corner of 74th Street and Central Park West.

Then—and before I went to put that magnetic container under that mailbox, he explained me how to do it and he explained what he means by walking drop.

Q. Did he— A. And he explained that way, that he can use it at one of those mail boxes on—between those streets on Central Park West.

And then in signal place he leaves a message, signal, that those four—one, that he has then—no, just four. It means that he has message in that drop on the corner of 74th Street, that he was using just the last number of that street corner. Or if he had a message on the corner of 77th Street, so he used the number seven, that he has there a message.

Mr. Donovan: Could we know, your Honor, when this conversation is supposed to have taken place?

The Court: Tell us all that Mark said to you on the subject, please.

The Witness: All this conversation is about Mark's drops, they have been before Mark went to Moscow in the first part of 1955.

(207) The Court: Did he say anything to you about who the messages were for?

The Witness: Yes. He explained that—

The Court: What did he say?

The Witness: He has to send messages to Soviet officials in those drops.

By Mr. Tompkins:

Q. When did you, to the best of your recollection, first hear about this walking bank from Mark? A. It was the springtime, 1955.

Q. Now, do you know of any other drops that Mark used? A. Let's see. No, I don't recall any others—other drops.

Reino Hayhanen, for Government—Direct.

Q. Do you know any signal areas that Mark used? A. One signal area, he was using that fence on Central Park West and 81st Street.

Q. All right. A. There is a fence around that museum.

Q. Did Mark use any meeting areas, to your knowledge? A. Yes. He told that several times he met Soviet officials in Symphony Theatre, and in the same place they had drop No. 2 under carpet in movie theatre, in balcony.

(208) The Court: Did you say Symphony Theatre or movie?

The Witness: Symphony Movie Theatre.

By Mr. Tompkins:

Q. Now, in other words, the Symphony Theatre was both a meeting place and a drop area? A. Yes. And he explained that it is very convenient because it has two exits; one, that main entrance, is from Broadway, then to side street is exit.

Q. Did you ever visit this Symphony Theatre with the defendant? A. Yes. Once I was over there with him.

Q. Approximately when? A. It was the springtime, 1955.

(209) Q. Now, I have here Government's Exhibit No. 17 for identification.

Will you look at it and, if you can, tell us what it is, will you, please?

(Counsel hands photograph to witness.)

A. (Witness examines photograph.)

Yes. This is that Symphony Theatre, and another exit is to this side street over here (indicating).

Mr. Tompkins: I will offer that, your Honor.

By Mr. Tompkins:

Q. The drop and the meeting area were inside the theatre, as I understand it? A. That's right.

Reino Hayhanen, for Government—Direct.

Mr. Donovan: Object to the photograph as irrelevant, your Honor.

The Court: Your objection is what?

Mr. Donovan: I object to the photograph as irrelevant.

The Court: Overruled.

(Photograph marked Government's Exhibit No. 17 for identification, was marked and received in evidence.)

By Mr. Tompkins:

Q. Now, have you given us the location of all of (210) Mark's drops that you know? A. No. 2, 4, 6, and 7. Yes, that's what I remember what he had.

Q. Have you given us all the locations of Mark's meeting places that you know? A. I knew only about this meeting place.

Q. All right. A. At Symphony Movie Theatre.

Q. Have you given us the location of all of Mark's signal areas that you know? A. He explained that he had one signal place at dentist—at some dentist's office—and he told that it was not convenient for him.

Then, what I mentioned already, that signal area close to that 81st Street and Central Park West.

Q. Did he say whether the signal— A. Then one more signal area that— The latest one was 95th Street subway station, and it was—

Q. Was it inside or outside the subway station? A. Inside, but I try to recall which line it was. It was Eighth Avenue Subway, in Manhattan.

Q. Did Mark give you, at any time, the location of a drop or bank? A. I didn't understand your question.

(211) Q. Did Mark give you for your use the location of a drop or bank at any time?

Mr. Donovan: Objection.

The Witness: That I would use his drops?

Reino Hayhanen, for Government—Direct.

Q. (By Mr. Tompkins) Yes, that is correct. Did he select one for you or any for you? A. No.

Q. Between the time you first met Mark—I believe you said July or August, 1954—and the time in June, 1955, he left for Moscow, did Mark give you any assignments? A. Yes. He gave me——

Q. Will you tell me about one of those assignments? A. One assignment, Mark got instructions from Moscow to locate one illegal agents—illegal agent. And in that message was that his wife has three garages in Red Bank, and we made trip to Red Bank but we couldn't locate.

Mr. Donovan: Could we know, your Honor, when he is supposed to have received these instructions?

The Court: I am sorry, I didn't hear you.

Mr. Donovan: Could we know, your Honor, when he is supposed to have received these instructions?

The Court: You mean must we know it now or may (212) we know it when you cross examine him?

Mr. Donovan: I think that we should know it now, your Honor, in order to enable us to——

Mr. Tompkins: I submit, your Honor, I asked the witness a question whether or not he had an assignment, and he starts telling me about an assignment, and I immediately get an objection on a date.

The Court: Yes. You know what lawyers are, Mr. Tompkins.

Mr. Donovan: Your Honor, yesterday he testified that he knew it was the spring time because of rain, and then he said that it might have been fall because it rained in the fall, too.

Mr. Tompkins: Is Mr. Donovan summing up?

The Court: No. This is just a little aside, that's all.

Mr. Tompkins: What was the last question?

The Court: He was telling us about a visit to Red Bank.

Reino Hayhanen, for Government—Direct.

Mr. Tompkins: May we have the last question and answer, though?

(Record read.)

By Mr. Tompkins:

Q. Do you remember approximately when you made this (213) trip to Red Bank with Mark? A. We made that trip in the end of 1954.

Q. In other words, around November or December, 1954? A. Yes. I believe in November, 1954.

Q. Now, do you know the name of the individual whom you were seeking information about? A. Yes. I know.

Q. What was his name? A. His name is—

Q. The name you knew him by? A. Roy Rhodes, and his nickname was Quebec.

Q. What do you mean, nickname? A. I mean by nickname, that is nickname as agent. They called him by the name Quebec.

Q. Where did you first hear the name Quebec? A. I heard the name first from Mark, when Mark—

Q. When did you— A. When we made that trip to Red Bank and we couldn't locate, so Mark told that we have to ask for more instructions from—for more information about his relatives or how to locate him because we couldn't locate him in Red Bank.

Q. Did you, pursuant to the conversation with Mark (214) about further instructions, did you seek further instructions? A. Yes. I had to send a message to Moscow, and in the same message, Mark told that I may as well ask for more information about Quebec.

And then I had—I got an answer to that message that Quebec's relatives live in Colorado; and then Mark gave me assignment to go to Colorado.

And in Moscow's instructions there was that we have to make plan how to locate through his relatives that agent.

Q. Then you had a conversation with Mark? A. Yes.

Q. About the Colorado trip? A. That's right.

Reino Hayhanen, for Government—Direct.

Q. Did he instruct you to go to Colorado? A. Yes, sir.

Q. And did you go to Colorado? A. Yes, I did.

Q. Whereabouts in Colorado did you go? A. To Salida, and from Salida I called to Howard by phone.

Q. Howard? A. Howard—How you pronounce it?

(215) Q. You went to Salida? A. Yes.

Mr. Tompkins: S-A-L-I-D-A, your Honor.

The Court: What is it, please?

Mr. Tompkins: S-A-L-I-D-A. And Howard, H-O-W-A-R-D.

By Mr. Tompkins:

Q. You called Howard? A. Yes, by the phone, and I was talking with Quebec's sister by the phone, and she gave me his mail address—Quebec's mail address.

Mr. Donovan: Objection, your Honor, and I ask that the answer be stricken.

The Court: What makes you say you were talking to Quebec's sister?

You mean you talked to somebody who said she was Quebec's sister?

The Witness: Yes, that is right.

The Court: I suppose that is not binding on the defendant, is it?

He talked to somebody. Having talked to somebody, what did he next do?

I will strike so much of the answer.

Mr. Tompkins: May I ask the witness this?

(216) By Mr. Tompkins:

Q. Was there any reason that you went to Salida? What I am asking you is, did you have any information that Rhodes lived in Salida?

Mr. Donovan: Objection, your Honor.

The Witness: No, I had information—

Reino Hayhanen, for Government—Direct.

The Court: You don't object to so much of the question that reads: "Why did you go to Salida?" You don't object to that, do you?

Mr. Donovan: No, but, your Honor, the manner in which it was formed is obviously leading.

The Court: You don't object to so much of the question as to why he went to Salida, do you?

Mr. Donovan: Yes, I do, your Honor. It calls for mental processes.

The Court: Overruled. Overrule the objection to that. He may be asked why he went to Salida.

Mr. Tompkins: I will withdraw the question, then.

By Mr. Tompkins:

Q. Did you have information that Rhodes lived in Salida? A. No. We got information from Moscow that his parents lived in—

(217) Q. All right. A. —Colorado.

Q. When you got to Salida how did you locate his parents?

Mr. Donovan: Objection.

The Court: I will allow it.

The Witness: Before Colorado trip we went with Mark to Central Library in Manhattan, and by phone book of Salida and Howard, we located that one, Rhodes' name, that that is Quebec's father's name over there.

By Mr. Tompkins:

Q. Do I understand you to say that you went to the Central Library with Mark? A. Yes.

Q. And looked up his phone number? A. That's right.

Q. When you got to Salida, as I understand it, you called that number; is that correct? A. That's right.

Q. Was the voice that answered male or female? A. Female. And when I asked that I like—

Wine: Hagmann, for Government—Direct.

The Court: Please. Just a moment, please.

Don't tell us what the voice said to you.

A female voice answered.

(18) The Witness: Yes, female.

By Mr. Tompkins:

Q. A female voice answered? A. Yes, a female voice answered.

The Court: What did you next do?

By Mr. Tompkins:

Q. What did— A. I asked that I like to talk with Roy Rhodes.

Q. And— A. So the woman answered that—

Mr. Donovan: Objection.

The Court: Yes, don't tell us that.

By Mr. Tompkins:

Q. Just what you said: Just what you said. You asked for Roy Rhodes? A. Yes.

Q. Was Roy Rhodes put on the phone? A. No.

Q. What else did you say? A. Then I said that, when I had an answer that he is not living over there—

Mr. Donovan: Objection.

The Court: Don't tell us that, please.

Mr. Tompkins: Don't tell us what she said.

(19) By Mr. Tompkins:

Q. In other words, you asked for Roy Rhodes? A. Yes.

Q. He was not put on the phone? A. No.

Q. Did you inquire—make any further inquiry about him? A. Yes. Then I told that maybe I can talk with his father.

Q. Was his father put on the phone? A. Yes.

So, his father was somewhere in China.

Reino Hagbaen, for Government—Direct.

Mr. Donovan: Objection.

Mr. Tompkins: All right.

By Mr. Tompkins:

Q. His father wasn't put on the phone? Then what else did you say? A. Then I said that I like to locate Roy Rhodes.

Q. Now, what else did you say, if anything? A. I said that I like to write a letter to him.

Q. Now, as a result of this phone conversation with this female voice, were you able to locate Roy Rhodes? A. Yes.

Mr. Donovan: Objection.

(220) The Court: Will you leave out "as a result" and say, "following the phone conversation did you locate him?"

Would you accept that?

Mr. Tompkins: I will accept that, your Honor.

By Mr. Tompkins:

Q. Following the phone conversation did you locate Roy Rhodes? A. Yes.

Q. Now— A. I did.

Q. When you were talking to this person on the telephone did you identify yourself? A. No. I identified myself just by the name Mike but I cannot remember what last name I told. I told that I am Roy Rhodes' friend.

Q. And you think that you gave a name of Mike something? A. Yes.

Q. Now, after you had this telephone conversation what did you do? A. Then I went to hotel and I stayed overnight and next day I made trip to New York City back.

Q. When you got back to New York City, did you advise (221) Mark of the results of your trip? A. On next meeting, it was several days later with Mark, we have been talking about that trip and he was satisfied that I found

Reino Hayhanen, for Government—Direct.

Quebec's mail address, that Quebec lived that time in Tucson, Arizona.

Q. Tucson, Arizona.

Who paid for this trip? A. Mark gave me money and it was like trip expenses.

(222) Q. Now, as I understand, you reported to Mark when you came back that you located Rhodes in Tucson, Arizona? A. That's right.

Q. Did you discuss Quebec further? A. Yes. We been discussing that it is, after all, too far to meet him each and to have some meeting places over there, that it will take long time.

And Mark told that because he has some other agents and he cannot go for so long trip that I have to locate Quebec.

Q. Now, did Mark tell you in any conversation the reason for locating Quebec? A. Yes. Then, before going to that Colorado trip he gave me a message on film where was more information about Quebec.

There was his nickname, his real name, then when he was born and where he was working, and who his parents and relatives are.

Q. Now, was that message on film? A. Yes.

Q. What kind of film? A. It was ordinary 35 millimeter film but later then I made soft film from it.

Q. In other words, it was hard film when you got (223) it? A. Yes.

Q. And you made it into soft film? A. That's right.

Q. How did you do that? A. I did it by putting it to dioxane and after several hours it became soft film.

Q. Now, did Mark tell you why—the reason—that he wanted you to try and find Rhodes? A. Yes. He told that he got instructions to locate him.

But then, when I located him in Arizona, in Tucson, Arizona, he told that he cannot go over there, that I have to locate him.

Q. I don't think that you understand the question. What, I am asking, was the purpose of locating Rhodes?

Reino Hayhanen, for Government—Direct.

Mr. Donovan: Objection.

The Court: He may state if Mark said anything to him on that subject.

I think that is what the question means.

Mr. Donovan: Could we have the question read, your Honor?

The Court: Yes, read the question.

(Record read.)

(224) The Court: You mean by that what did Mark say about the purpose?

Mr. Tompkins: That is right.

By Mr. Tompkins:

Q. What did Mark, if Mark discussed the purpose of locating Rhodes, what did he say to you? A. He said that Quebec could be good agent because he is—some of his relatives are working on—and he—on military lands.

He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was.

Mr. Tompkins: Will you mark this, please?

(Photostat was marked Government's Exhibit No. 18 for identification.)

Mr. Tompkins: Excuse me, your Honor. I have just a photostat, and I wanted to explain to Mr. Donovan.

Mr. Donovan: You are not going to offer this?

Mr. Tompkins: No, I am not going to offer it. I am going just to have it identified.

By Mr. Tompkins:

Q. Mr. Hayhanen, you testified that you had received, as I recall, some information from Mark relative to Quebec; is that correct? (225) A. That's right, yes.

Reino Hayhanen, for Government—Direct.

Q. And that you subsequently transferred it from hard film to soft film? A. That's right.

Q. Now, I have here a photostatic copy, Government's Exhibit No. 18 for identification. Will you examine that and see if you recognize the contents?

(Counsel hands document to witness.)

A. (Witness examines document.) Yes, this is—

The Court: You do recognize it, do you?

The Witness: Yes, I do.

By Mr. Tompkins:

Q. Will you tell us—

The Court: He shouldn't tell us what a document not in evidence is.

Mr. Tompkins: All right, thank you.

We are not going to offer it at this time, your Honor.

By Mr. Tompkins:

Q. Now, this message that you have just recognized and which you say you transferred from hard film to soft film, what did you do with that message? A. I put it into bolt.

(226) Q. You put it into a bolt? A. Yes, into container.

Q. Where did you put the container, if you remember?

A. I left that container, with some other bolts, in one of rooms.

Q. In one— A. In one of my rooms.

Q. You left—did I understand you to say that you left the container along with some other containers? A. With some other bolts.

Q. With some other bolts in one of your rooms? A. Yes.

Q. And the container contained the soft film message?

A. That's right.

Q. Relating to Quebec? A. Yes.

Reino Hayhanen, for Government—Direct.

Q. When you say one of your rooms, whereabouts? A. In Peekskill.

Q. Peekskill? A. Yes.

Q. Did you have any further conversations with the defendant relating to this Quebec, Roy Rhodes? (227) A. Yes. (We had several conversations about Quebec.

Q. Will you tell us about those conversations? Were they before or after your trip to Salida? A. They been after my trip to Salida.

Q. Will you tell us about those conversations? A. Because Mark was preparing for trip to Moscow he—

Mr. Donovan: Objection.

By Mr. Tompkins:

Q. Just tell us what the conversations were. A. The conversation been that Mark told that he may as well locate Quebec himself on the way to Moscow.

Q. Did you have any other conversations about Quebec? A. Yes.

Then after Mark returned from Moscow he explained that he didn't locate Quebec.

Q. Did you do anything further in an endeavor to locate Quebec? A. No.

Q. Now, in addition to this assignment to locate Quebec which the defendant gave you did you receive other assignments from him and, if so, will you tell us about one? A. Yes, I did.

Q. Will you tell us about it? (229) A. Then I got instructions to locate another agent in Boston, Massachusetts.

Q. Will you fix a time generally?

Was it before Mark went to Moscow? A. Yes, it was. It was winter, 1955.

Q. In other words, winter, 1955? A. Yes.

Q. And Mark instructed you to locate an individual, did you say, around Boston? A. Yes. In Boston vicinity.

Q. Was it in Boston or was it in a nearby town? A. It was in nearby place.

Reino Hayhanen, for Government—Direct.

Q. Can you give us the name of the town, if you remember? A. No, I cannot remember exactly the name, but by the map I located it when I was giving that information to F. B. I.

Q. What did you do as a result of Mark's instructions to locate this individual? A. As a result of these instructions—

Mr. Donovan: Objection.

The Witness: —there was—

The Court: Did you object? Did I hear an objection or didn't I?

(230) Mr. Donovan: Objection to the form of the question.

The Court: May I hear the question, please?
(Record read.)

The Court: Would you be willing to say, "What did you do after receiving the instructions?"

Mr. Tompkins: I certainly would, your Honor.

The Court: Would that satisfy your objection?

Mr. Donovan: It would, your Honor.

The Court: I am a little bit confused about one thing, and I would like to get it straight now.

I understood the witness to say that this assignment to locate somebody in Boston was in the winter of 1955 before Mark went to Moscow.

Mr. Tompkins: I think that I caused that confusion. I asked the witness—I am trying to use the trip to Moscow to bring the witness closer to a specific date for Mr. Donovan, so I have been using a period generally of prior to leaving for Moscow and afterwards, and I have been confining all my questions—

The Court: But if the trip took place in June, 1955 how could this have happened in the winter of 1955 before he went to Moscow?

That is my difficulty.

Reino Hayhanen, for Government—Direct.

(231) Mr. Tompkins: Well, then, as I say, that has been my fault, because I tried to divide it in a period of roughly August, 1954 to June, 1955, and then a second period thereafter.

The witness testified that Mark went to Moscow in June of 1955.

Is that correct?

The Witness: Yes.

Mr. Tompkins: And he says that this occurred in the winter of 1955.

The Court: But the winter in 1955 occurred after June of 1955, didn't it?

So therefore he couldn't have done it before he went to Moscow, if he went in the month of June of 1955.

Mr. Tompkins: What do you mean by the winter of 1955?

The Witness: By the winter of 1955 I mean January and February of 1955.

The Court: Thank you.

By Mr. Tompkins:

Q. After you received instructions from Mark to locate this individual around Boston, what did you do? A. I made the trip to Boston.

(232) Q. What did you do when you got to Boston? A. I took hotel in Statler Hotel, hotel room in Statler Hotel and next day then I made trip to that Boston vicinity.

Q. All right. What did you do in the vicinity of Boston in an endeavor— A. In the vicinity of Boston I found that street which was in those instructions where that agent should live and I went to one house and I was talking to a man who fit those descriptions.

Q. In other words, you had a description of the individual? A. Yes, sir.

Q. With you? A. No, I remembered them.

Q. Who had given you the description of the individual?

A. I got the message from Moscow.

Reino Hayhanen, for Government—Direct.

Mr. Donovan: Objection, your Honor.

The Court: Oh, I will let that stand. — He has shown us how he received messages from Moscow, Mr. Donovan.

Mr. Donovan: There is no identification of the date.

(233) The Court: He said it was January or February of 1955.

Mr. Tompkins: The witness is testifying, your Honor, over a five-year period on many instances. I don't see how he could be asked to fix a date and specific day in the week. He is giving us to the best of his recollection—

The Court: He told us he had a description and he told us where the description came from.

Now, what happened? That is what we would like to know.

Mr. Tompkins: That is right.

By Mr. Tompkins:

Q. Now, would you tell us whether you had a name given to you by Mark of this individual?

The Court: Did you know the name of the man you were looking for?

The Witness: Yes.

The Court: How did you find it out?

The Witness: That name was in the same message what I got from Moscow.

By Mr. Tompkins:

Q. All right. Do you remember what the name was?

A. The name was Swedish name. My best recollection is (234) name was Olaf Carlson. He was Swedish ship engineer.

Q. Now, did you make an attempt to locate him? A. Yes, I did.

Q. Will you tell us just what you did? A. I wrote the same last name on the envelope, but different first name.

Reino Hayhanen, for Government—Direct.

When I came to that house where ship engineer should live, I knocked at door and I explained that my friend asked to deliver this letter to this person and he explained that this person lives on this street, but he told that his name is not; that is not his name, and he doesn't know where that kind of person lives.

Q. Now; as a result, did you find Carlson? Did you ever locate him? A. I believe I found him, because he was about the same age and Swedish looking man, blond like was in that message, age was about the same and he was tall.

Q. Did he say he was Olaf Carlson? A. No, he didn't say it, but he told that that is not his name because there was first name different; but main thing was just to look at the man, is he the same, because I got instructions only to locate him, but not to talk with him as an agent.

Q. Now, did you return to New York after this meeting? (235) A. Yes, I did.

Q. Did you report the result to Mark? A. Yes, I did.

Q. Did you talk to him about it? A. Yes, I was talking.

Q. Will you give us the conversation with the defendant? A. When I reported to Mark what I found, that I located certain man and that I believe that is Swedish ship engineer, he told that next my message to Moscow I have to report about this trip.

So, I did it too.

Q. Did you have any further conversations with Mark?

A. No.

Q. Now, did you receive any other assignments from the defendant? A. Then, yes, one more.

Q. About when did you receive this assignment? A. Well—

Q. If you can fix the month and the year, to the best of your recollection. A. It was springtime, 1955.

Q. Springtime, 1955. Will you tell us what that assignment was? (236) A. It was to locate one more agent close to Atlantic City.

Q. All right. A. In Arlington.

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Q. I beg your pardon? A. In Arlington, close to Atlantic City.

Q. Now, did you go on this assignment alone? A. No, we took that trip together with Mark.

Q. You took the trip together with Mark? A. Yes.

Q. Will you tell us what you did? Where did you leave from? A. We left from New York City and by New Jersey Turnpike we came to Atlantic City and by Highway 2.

Q. When you got to Atlantic City, what happened? A. We had lunch and after that lunch then we made phone call.

Q. Who made the phone call? A. I cannot remember exactly who made—did I or did Mark call, but one thing for sure is that we couldn't locate that agent.

Q. Did you have any conversation with Mark about the agent? A. Yes, we had because by the phone that agent's (237) relatives told us that they don't—

Mr. Donovan: Objection.

The Court: He may state anything that Mark said to him.

Q. Just tell us of your conversation with Mark, not what anybody else said, just what you and Mark discussed. A. Mark explained that if relatives don't like to know about this agent anything, so this agent is no good for us either because of his background or maybe of his membership in Communist Party, he is no good agent for us, and that is what was reported to Moscow, that we couldn't locate this agent.

Q. Who reported it to Moscow, you or Mark? Do you remember? A. For my best recollection, Mark reported it to Moscow.

Mr. Donovan: Objection, your Honor.

The Court: Did Mark ever say to you whether he had reported to Moscow?

The Witness: Yes, he told to me that he would report about it to Moscow.

The Court: He said that he would report it?

The Witness: Yes.

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By Mr. Tompkins:

Q. Now, Mr. Hayhanen, did you ever take a trip to (238) Hopewell Junction with the defendant?

Mr. Donovan: Objection.

The Court: Why?

Mr. Donovan: It seems to me to be leading.

The Court: I think it is leading, but not harmfully so.

The Witness: Yes, we did.

By Mr. Tompkins:

Q. Would you tell us about that trip? How did you go?

A. We been driving by Taconic, Sawmill Parkway and Taconic State Parkway.

Q. Would you tell the Court and jury the purpose of that trip to Hopewell Junction? A. The purpose of that trip was that Mark got instructions from Moscow to find good location for illegal radio station.

The Court: Is that what he told you?

The Witness: Yes, he did.

By Mr. Tompkins:

Q. And Mark accompanied you on this trip, is that right? A. Pardon?

Q. Mark accompanied you to this trip to Hopewell (239) Junction? A. Yes.

The Court: Is that New York or New Jersey?

By Mr. Tompkins:

Q. Is that New York or New Jersey? A. It is New York State.

Mr. Tompkins: I think it is New York.

By Mr. Tompkins:

Q. When you arrived at Hopewell Junction, what did you do? A. We went to one office where it was advertised that they are selling property.

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The Court: Real estate office?

The Witness: Yes, real estate office, and we been looking there for one property for ten acres, but it was not good enough for illegal radio station.

By Mr. Tompkins:

Q. Did you have a specific property in mind when you went into the real estate office? A. Yes, it was advertised by the newspaper.

Q. And who had the location of that property? You or the defendant? A. The defendant. He found it by newspaper advertisement.

(240) Q. And did you discuss the location on your way to Hopewell Junction with him? A. Yes, we did.

Q. Now, what was the result of your visit to the real estate office? A. The result was that Mark told that they were—we think it over, but we didn't go any more to that real estate office.

Q. All right. Now, did you or Mark or both of you on other occasions attempt to locate a site? A. Yes, we did one more trip.

Q. Will you tell us where you went? A. It is in New Jersey, Highway No. 17, from that highway No. 17 several miles we turned to another highway, I cannot remember the number of it and there was one property for sale, \$15,000; but it was too expensive for that illegal radio station.

Q. So you did not buy that, then? A. No.

Q. Now, you had conversations concerning these two radio station sites? A. That is right.

Q. Now, did Mark say what the purpose was? A. Yes, he explained that this illegal radio station (241) should be for transmitting messages to Moscow for officials.

Q. Did Mark ever tell you that he was sending messages?

Mr. Donovan: Objection.

The Court: I will allow it.

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A. He was telling only about sending messages through drops, but not by radio transmitting; but he told that he was receiving by radio, messages.

Q. Did he tell you how he received the messages? What method? A. Yes, he did.

Q. Will you tell us what he said? A. He told that he is taking that radio message on tape recording and from tape recording then he is taking it to paper and deciphering it.

Q. Do you know whether the defendant had any sending equipment? A. He mentioned couple of times about key, Morse code key.

Q. Will you tell us what he said? A. He said to me that I had to learn Morse code too and he will give me Morse code key to practice because a illegal espionage work—he explained that everyone has (242) to learn Morse code.

Q. Did he ever give you a Morse code key? A. No, he didn't.

Q. Did he ever give you any instructions to learn Morse code? A. Yes, he gave me—

Mr. Donovan: I object.

The Court: What did he say about Morse code? Tell us.

The Witness: Before his trip to Moscow it was in May or beginning of June, 1955, he told that I have to learn Morse code; but I didn't.

Mr. Tompkins: Your Honor, may Mr. Donovan and I approach the bench a moment, please?

The Court: Surely.

(Side-bar discussion.)

Q. Mr. Hayhanen, I just want you to answer this question yes or no: Did you conduct a surveillance of an individual in Queens County at the instruction of the defendant, Mark? A. Yes, I did.

Q. Without telling us his name, will you tell us what you did, just very briefly? A. By following that man's wife I found where she works (243) and then I was check-

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ing that man if would go from his home, but he stayed in several occasions when I was there he would stay all the time at his home.

Q. Now, after you made these surveillances did you report to the defendant? A. Yes, I did.

Q. Now, prior to June, 1955, when you testified that Mark went to Moscow, did you accompany him to any other location in the vicinity, general vicinity of New York State?

A. We been travelling in several states on several occasions, just to—we been taking some few photos; we been in New York State, New Jersey, Pennsylvania.

Q. Well, on one of these trips did you have occasion to go to Bear Mountain Park? A. Yes, we did.

Q. All right; were you accompanied by the defendant? A. Yes.

Q. And how did you go? A. We went by the car.

Q. And what was the purpose of your trip to Bear Mountain Park?

Mr. Donovan: Objection.

(244) The Court: Did you have any conversation about or with Mark concerning the trip to Bear Mountain?

The Witness: Yes.

The Court: What did he say?

The Witness: He said that we have to find couple of places to hide some money.

(245) Q. How much money? A. Five thousand dollars.

Q. Now, will you tell us what else he said? A. And he said that five thousand dollars we have to give to agent Stone's wife.

Q. Agent Stone's wife? A. Yes.

Q. Was Stone a code name? A. Yes, code name.

Q. Will you tell us the name of Stone's wife? A. His wife is Helen Sobell.

Q. S-O-B-E-L-L? A. That is right.

Q. Now, what were you to do with the money in Bear Mountain Park? A. Mark told that we have to locate Stone's

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wife and ask her to come to Bear Mountain Park where we can talk with her and give her that money.

Q. Did you actually bury the money in Bear Mountain Park? A. Yes, we did.

Q. All right. Did you at any time in the future bring Helen Sobell to Bear Mountain Park? (246) A. No, we did not.

Q. Now, after you buried the money, what did you do? Did you leave Bear Mountain Park? A. Yes, we did.

Q. Now, did you have a further conversation with the defendant Mark about this money that was buried in Bear Mountain Park? A. Yes, we had.

Q. All right. Will you tell us about that conversation? A. Mark told me that I got instructions to give those money to Helen Sobell.

Q. Did he say from whom he had gotten the instructions? A. From Moscow.

Q. Did he tell you what the instructions were, in addition to giving the money to Helen Sobell? A. To locate Helen Sobell, and he told that he tried several times to locate her, but close to her apartment in on street corner near there was almost all the time a policeman.

Q. Now, do you know whether Mark was advised of her address? A. Yes, in that message there was her address which was (247) mentioned around 145th or 147th Street in Manhattan.

Q. All right. Now, did the message—did Mark tell you whether or not the message contained any method of identifying or the identification of Helen Sobell?

Mr. Donovan: Objection.

The Court: What did he say on the subject, if anything? Would you object to that?

Mr. Donovan: No, your Honor.

By Mr. Tompkins:

Q. All right. A. Mark told me that he got a letter from the man who recruited Stone as an agent, just that when

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Helen Sobell would read that letter she will know then that that is right man who will give that money.

Q. Did Mark— A. From Soviet espionage.

Mr. Donovan: Could we have the time of this conversation?

The Court: Could we have what?

Mr. Donovan: The approximate time of this conversation, your Honor.

By Mr. Tompkins:

Q. Would you tell us approximately when this conversation (248) occurred, this Bear Mountain trip and the subsequent conversation? A. It was springtime in 1955.

Q. Just before Mark went to Moscow? A. Yes, about several weeks before.

Q. Did Mark tell you the name of the agent who reportedly recruited Sobell? A. No.

Q. At the time—

Mr. Donovan: Objection.

By Mr. Tompkins:

Q. Now, did you have any further conversations with Mark about Mrs. Sobell? A. Yes, we had.

Q. Will you tell us about those conversations? A. After Mark returned from Moscow.

Q. I mean prior to his visit to Moscow. A. Yes. We been talking about Helen Sobell and we been driving to that street where Helen Sobell should live and Mark showed me the house.

I cannot remember now exactly the number, was it 304 or 306 or 308; one of those three numbers.

Q. Now, did you enter the house? A. No.

(249) Q. Now, subsequently before Mark left for Moscow, did you have a further conversation—

Mr. Donovan: Pardon me, your Honor, couldn't we have any references to the normal calendar years and months rather than repeating over and over

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again an identification prior to a trip to Moscow which has not been proven?

Mr. Tompkins: Well, the defendant has testified——

Mr. Donovan: The defendant hasn't taken the stand.

Mr. Tompkins: The——

The Court: I don't think that the defendant has testified at all.

I think you mean that the witness has testified.

Mr. Tompkins: I think I corrected myself.

The Court: Does it make any difference to you if we refer to June, 1955, or the trip to Moscow? Does it make any difference to you?

Mr. Tompkins: I can't see any great difference.

Mr. Donovan: It makes a difference to me.

Mr. Tompkins: If Mr. Donovan will tell me what difference it makes to him, I will be glad to do it.

The Court: I would rather not do that, I am (250) afraid he will make a speech.

Mr. Tompkins: All right.

By Mr. Tompkins:

Q. Prior to June, 1955, then, you say this occurred around the spring of 1955? A. Yes.

Q. Now, after your trip with Mark to Mrs. Sobell's home, did you receive an assignment from the defendant concerning Mrs. Sobell? A. Yes.

Q. Will you tell us when it was? A. Because Mark was preparing for Moscow trip he told that he wouldn't have enough time to locate Helen Sobell, that I have to locate her and to give that money.

Q. All right.

He instructed you then to give Mrs. Sobell the five thousand dollars? A. That is right.

Q. At that time where was the five thousand dollars?

A. They been buried in Bear Mountain Park.

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Q. How was it buried, all together, or how? A. No, in two different places; three thousand and two thousand dollars.

Q. Now, did you give Mrs. Sobell—

(251) The Court: Why not gratify our curiosity about it?

Were the bills encased in anything? Were they wrapped in anything?

The Witness: Yes, they been wrapped in cellophane bag and in paper.

The Court: Who did the wrapping?

The Witness: Mark did.

The Court: Did you see him do it?

The Witness: No, I didn't see him doing it, but I saw those two packages.

The Court: In his possession?

The Witness: Yes, and then we buried them together at Bear Mountain Park.

By Mr. Tompkins:

Q. Did you follow Mark's instructions and give Mrs. Sobell the five thousand dollars? A. Did I follow— No, I did not.

Q. Did you report what you had done in connection with Mrs. Sobell? A. Yes, I did.

Q. And how did you report your action? A. I reported that I located Helen Sobell and I gave money and told to her to spend them carefully.

(252) Q. How did you make this report? Was it to the defendant or through a drop? A. It was through a drop to Moscow officials.

Q. What else did you say in your report, if anything? A. I cannot remember if I said something else.

Q. Did you receive an answer through a drop? A. Yes.

Q. Concerning your report? A. Yes.

Q. What did the answer say? A. The answer was that to locate Helen Sobell once more to talk with her once more and to decide is it possible to use her as an agent.

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Q. Was it your impression——

Mr. Donovan: Objection.

Mr. Tompkins: Well, now, if I can finish, I would like to argue that.

I think the witness may testify as to his impression.

By Mr. Tompkins:

Q. Was it your impression from that message that Helen Sobell had been an agent prior to that time?

Mr. Donovan: Objection, your Honor.

(253) The Court: I am afraid that that objection is sound, Mr. Tompkins.

He may state anything in the message that purported to tell anything about her prior activities.

By Mr. Tompkins:

Q. Will you state that? A. When Mark explained to me that money should be given to Stone's wife, he explained that usually in Soviet espionage practice they recruit husband and wife together as agents.

Q. So is your understanding from Mark that both husband and wife had been agents for the Soviet Union? A. Yes.

Q. Now, is there anything contained in the message that you received concerning any future money?

Mr. Donovan: Objection.

Mr. Tompkins: I was going to ask, for Helen Sobell; I will add it now for your Honor's consideration.

The Court: Do you understand the question?

Mr. Tompkins: Mr. Donovan has an objection.

Mr. Donovan: I objected, your Honor.

The Court: May I hear the question, please?

(The court reporter thereupon read the last question.)

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The Court: What is the objection?

(254) Mr. Donovan: Obviously a leading question. Can he just state what was in the message?

The Court: I don't think that it is harmfully leading. However, I will sustain it.

Have you told us all that was in the message?

The Witness: Mark explained after returning from Moscow that he got instructions to locate Helen Sobell, to give her five thousand dollars more, five thousand dollars.

By Mr. Tompkins:

Q. Did you say this is a conversation after he returned from Moscow? A. Yes.

Q. Did he say anything else after that conversation concerning Helen Sobell? A. Yes, he did, that I have to locate her once more and that we have to arrange meeting place somewhere off Broadway, when you are driving by Sawmill River Parkway.

Q. Did you have a meeting with Helen Sobell? A. No.

Q. Did you have any communication with her? A. No, but Mark explained that he got those five thousand dollars in the bank.

Q. Now, this is not the same five thousand dollars (255) that you buried? A. No.

Q. Did you have any other conversation with the defendant, Mark, concerning Helen Sobell thereafter? A. No.

Q. And you have told us all that you can remember concerning your conversations with Mark about Helen Sobell? A. That is right.

Q. Now, you stated yesterday that you had lived at 806 Bergen Street, Newark? A. Yes, sir.

Q. Now, can you tell us why you moved there?

Mr. Donovan: Objection, your Honor.

Mr. Tompkins: All right.

By Mr. Tompkins:

Q. Can you tell us whether you maintained that house as a residence?

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Was that your residence? A. Yes.

Q. And did you have an occupation at that time?

A. No.

Q. What did you do at 806 Bergen Street? A. I was preparing it to open photo studio, but because (256) that store was wet and very cold, I decided that it is impossible to open it over there, photo studio.

Q. Had you discussed the opening of this photo studio with the defendant, Mark? A. Yes.

Q. Will you tell us your discussions, please? A. Well—

Q. First of all, approximately when did these discussions take place? A. It took place at the end of 1954 and in the first months of 1955, in several occasions.

Q. Now, when did you move to 806 Bergen Street, approximately? A. Approximately I moved in May, 1955.

Q. All right.

Now, will you tell us your conversation with the defendant, Mark, concerning this photo studio at 806 Bergen Street? A. Mark explained that he knows photography and he made drawings of special tables for photo studio, what I can make myself. So I bought building materials and I made several tables.

Q. Did you—

The Court: Several what?

(257) The Witness: Tables.

The Court: Tables?

The Witness: Yes.

By Mr. Tompkins:

Q. Did Mark instruct you to set up this photo studio? A. Yes.

Q. Will you tell us of any conversations you had with the defendant concerning those instructions? A. He gave me then written instructions how to make separation negatives and another instruction how to make matrix film.

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Q. Did you advise anybody through drops that you were setting up this studio? A. Yes, I send a message to Moscow officials through drop. In that message I mentioned that during conversations with Mark we prefer that to open photo studio as cover work for me.

Then, I got another answer to that message that they agreed in Moscow to set up photo studio.

Q. Who paid the expenses of this studio? A. Before leaving Moscow was in those written instructions what I mentioned yesterday, there was that I could get five thousand dollars for cover work, but because I didn't open photo studio I didn't get those five (258) thousand dollars.

Q. Now, who paid the rent? Did you? A. Half of rent I was getting from Mark and half I paid from my salary.

Q. In other words, as I understand it, you were setting up a studio and you were living there at the same place? A. That is right.

Q. Well, then, is it your testimony that you never actually set up the cover—ever set up the studio? A. No, I didn't set up.

Q. How long did you live at this Bergen Street address? A. I lived from May, 1955 up to—I cannot recall exactly the month, 1956; but I believe it was summer of 1956.

Q. From about May, 1955 to the summer of 1956? A. Yes, up to summer, 1956.

Q. Now, from June, 1955—After June, 1955, when did you next see the defendant, Mark? A. Next time I met him, 1956 in July.

Q. July, 1956? A. That is right.

Q. Did you have a conversation with him when you saw him in 1956 about the photographic studio? (259) A. Yes, he asked me did I open photo studio. I told I did not because it is impossible to open over there, that it is too wet, the store room and other rooms too, so he was not satisfied that I didn't open and I didn't practice enough for making color pictures, and then he told that I might as well go for a vacation to Moscow to see my relatives.

Reino Hayhanen, for Government—Direct:

Q. You say you stayed at 806 Bergen Street until the summer of 1956; then where did you move from there? Do you remember? A. From there I moved to Peekskill, New York State.

(260) Q. This morning, Mr. Hayhanen, I asked you about your trip to Boston. You recall? (261) A. Yes, sir.

Q. How did you go to Boston? By train or car or bus? A. By car.

Q. By automobile? A. Yes.

Q. And you could not remember the name of the location near Boston? A. That's right.

Q. Now, I have here a map of the Boston area, and I wondered if you would look at it and see if this will refresh your recollection as to the name of the town (counsel hands map to witness)? A. (Witness examines map.)

The Court: Are you in a position to suggest a name to him?

Mr. Tompkins: I am, your Honor.

The Court: Do you have any objections?

Mr. Donovan: None at all, your Honor.

By Mr. Tompkins:

Q. Was it Quincy? A. Yes, it was Quincy, and here it is on the map (indicating).

The Court: We call it Quincy. They call it (262) "Quinzy."

By Mr. Tompkins:

Q. Now, also this morning you gave us the name of Stone, an agent who was the husband of Helen Sobell. Is that correct? A. That's right.

Q. Can you identify Stone any further? A. He is accused of spying for—

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Mr. Donovan: I object, your Honor.

The Witness: —Soviet Russia and is serving, I believe, a thirty-year sentence.

The Court: What do you object to?

Mr. Donovan: I believe he said he is an accused.

The Court: Well, he followed that by saying he is serving a sentence of thirty years, is now in prison, has been prosecuted and sentenced.

It is the same man, is it? Is that your testimony?

The Witness: That is right.

Mr. Donovan: Your Honor, I do not believe he has testified he ever met him. Has he?

Mr. Tompkins: He is identifying Stone. He did not say that he met him. He is identifying him as the husband of Helen Sobell.

(263) Mr. Donovan: I object.

Can I have a ruling on the objection, your Honor?

The Court: Are you still objecting?

Mr. Donovan: Yes, your Honor.

The Court: I am still overruling it.

By Mr. Tompkins:

Q. Now, this morning you also testified to making a surveillance for Mark somewhere in Queens County? A. Yes.

Q. The first time that you made the surveillance were you accompanied by the defendant? A. Yes, I was.

Q. And could you give us the name of the town, if any? A. It's New Hyde Park.

The Court: Is that in Queens County?

Mr. Tompkins: I think it is half in Queens and half in another county, your Honor. I am not sure. I am not a resident.

By Mr. Tompkins:

Q. Now, between August, 1954, when you met the defendant, and June, 1955, did the defendant ask you to decipher any messages? (264) A. Yes. He asked. He got—

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Q. Tell us about it, please. A. He got by the radio three—two or three messages. I can't recall right now how many exactly, two or three.

And he told that he couldn't decipher them and he thought that maybe those messages are for me.

So he gave me to try to decipher them, but by my code I couldn't decipher them either; and next—on the next meeting Mark told me that he got another message that those ciphered telegrams, they been for somebody else, not for us.

Q. I don't think I understand you. You said decipher or decipher? A. Decipher. Decipher.

Q. In other words, he gave you the messages in code? A. Yes.

Q. And asked you to decipher them? A. Yes.

Q. Now, after June, 1955, I believe this morning you testified that the next time you saw Mark was in July, 1956 or the summer— A. That's right.

Q. —of 1956.

(265) Did you meet with him? A. Yes, I met him in the same men's smoking room and in the same movie theatre.

Q. How was that meeting arranged? A. It was arranged the same way that I got a message that somebody was to meet me.

So that meeting place was already before for that but there was some misunderstanding about it. So that meeting—

Q. Would you speak up a little louder, please? There are so many buses out here. A. There was some misunderstanding. When I got that message there was just that "I like to meet you in the same place as before."

And when I recalled where before I met somebody from Russian officials or Mark, I remembered that I met Mark last time in movie theatre, in Symphony Movie Theatre, so I went over there and looks to me Mark was looking for me in RKO Keith Theatre.

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So then I sent a message that I will go and wait for meeting with you in the same place where I met first time Mark.

After that we met each other then, after Mark's arriving from Moscow:

(266) Q. Now, I believe you also testified this morning that Mark was dissatisfied because of your failing to set up the photographic shop in Newark? A. That's right.

Q. And that he suggested that you might go home on leave to Moscow; is that correct? A. That's right.

Q. Now, did you have any further conversations with the defendant concerning the leave to Moscow? A. Yes. I had several conversations and—

Q. Would you tell us about them? A. Mark explained that he sent the message to Moscow which said that because I didn't open the photo shop, I may as well go—or, there is time for me to go for a vacation.

(267) Q. Did you receive any communication granting you leave? A. Yes. I got a message from Moscow where it was said that my vacation is permitted and as soon as possible I have to apply for the United States passport and go as a tourist to Europe.

Q. After this conversation with Mark on the question of leave and the photographic shot, did you see him thereafter? A. I saw Mark last time in February, 1957.

Q. I am talking now, you saw him in July, 1956 when he came back from Moscow; is that correct? A. Yes.

Q. And you had the conversation about the photographic shot and the leave, is that correct? A. Yes.

Q. Now, when did you next see him? A. Like I testified before, usually we been meeting once or twice a week, so I was meeting him regularly.

Q. Now, during that period that you were meeting him; did you receive any assignments from Mark, if you can remember? A. Like I testified before, I got that assignment to locate Helen Sobel once more in connection to give her (268) \$5,000 more money.

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Q. And did you locate her? A. No.

Q. Did you have further conversation with Mark concerning your leave—

Mr. Donovan: Objection.

By Mr. Tompkins:

Q. Your return?

Mr. Donovan: I believe these questions are leading, your Honor.

The Court: Objection overruled.

By Mr. Tompkins:

Q. Would you please answer the question? A. Yes. By that—when I got that message from Moscow that my vacation is permitted, there was in the same message that I have to make plan with Mark how to go and what to tell to some of my friends where I am going and why.

So we been discussing that matter and Mark told to me that he will send message that would prefer that I will go for a vacation by ship; but later we get an answer that they preferred it from Paris, up to Paris by ship and train by—from Paris, then I have to fly to West Berlin.

Q. You said we got an answer. Did Mark communicate with anyone, to your knowledge? (269) A. Yes.

Q. With whom? A. I recall that he sent from drop a message and he got an answer then that it should be by the plane from Paris.

Mr. Donovan: Objection and move to strike the answer.

The Court: He may state anything that Mark told him on that subject.

Mr. Donovan: He didn't testify that Mark told him this, your Honor.

The Court: Suppose you ask him.

Mr. Tompkins: What is his last answer, please?

(Record read.)

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By Mr. Tompkins:

Q. Did Mark tell you about this answer? A. Yes, he told me.

Q. Was he the one who gave you the instructions then to go to Paris by plane— A. Not—

Q. In other words, rather than ship? A. No. Like I mentioned before that after Paris I had to go by the ship and train but from Paris—

Q. I beg your pardon. A. —by plane to West Berlin.

(270) Q. Did he give you that information? A. Yes, he gave me. And—

Q. Now is there— A. I didn't—excuse me.

Q. All right. A. I didn't tell exactly the way it should be from Paris to—from Paris I should take a train for—to Germany and from Germany by the plane to West Berlin. That is the way it should be.

Q. Now, did you have any further conversations on your plans to leave with Mark? A. Yes. We had conversations about this leaving.

Q. Speak a little louder, please. A. And Mark told that he likes to send a parcel to his family, too, through me; but when we got that answer that I have to fly by the plane to West Berlin, Mark told that I cannot get then so much parcels, that he withdrew then his request.

Q. Was any other route discussed with Mark? A. There was in this same message that—how I have to call by the phone to Russian officials in Paris.

Q. What I am asking by the term "route," I mean was there any other—

The Court: Itinerary.

(271) Mr. Tompkins: Itinerary.

By Mr. Tompkins:

Q. In other words, another itinerary besides the boat to Paris discussed with Mark? A. Yes, there was.

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That I may go to Mexico, too, or to Canada; but it was left, that question, to decide just which way would be better and safer.

Q. Now, did you have a discussion on the Mexican itinerary with Mark? A. Yes, we had.

Q. Will you tell us about that discussion? A. That discussion was that in Mexico City I had to wait in one bar for Russian official who will come and who will talk with me. Then he will give me further instructions.

Q. Did you have any instructions from Mark as to what to wear?

Mr. Donovan: Objection.

The Witness: Yes, and he gave me birth certificate, that if it is impossible to use United States passport that I can use that birth certificate to go to Mexico City and from there then use the United States passport.

By Mr. Tompkins:

(272) Q. I have here Government's Exhibit 19 for identification. Will you examine that and, if you know what it is, tell us what it is.

(Counsel hands document to witness.)

A. (Witness examines document.)

This is that birth certificate what I mentioned just before, what Mark gave me and what he explained that I can use it for going to Mexico City.

Q. What is the name of the birth certificate that he gave you? A. Lauri Arnold Ermas.

The Court: I suppose you had better get it in.

Mr. Donovan: I object.

By Mr. Tompkins:

Q. When you got that birth certificate from Mark, what did you do with it? A. I buried it in basement in Peekskill because I didn't like to use it.

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Q. Will you explain just how you buried it in the basement of your home in Peekskill? A. I wrapped into paper and then to cellophane bag, and I put into sand in basement.

Q. Now, about this time did you have any conversations with the defendant concerning the Queen Elizabeth? (273)

A. Yes.

Q. Will you tell us what those conversations were and can you fix a date?

Can you give us an approximate date? A. It was in January, 1957 when I met Mark and he told that I can buy a ticket for first ship going to Europe, and when I checked by—with steamship company they told that Queen Elizabeth is leaving—was the 31st of January or 1st of February, I cannot remember exactly right now.

Mr. Donovan: Your Honor, with respect to this birth certificate, do I understand that the Government is not offering it in evidence at this time?

The Court: I haven't observed any offer yet.

Mr. Tompkins: That is right, sir.

Mr. Donovan: Could, your Honor, we have an indication as to when and where the meeting was supposed to have occurred at which he was supposed to have received the birth certificate?

Otherwise I move to strike his testimony concerning it.

Mr. Tompkins: I will offer it at this time.

By Mr. Tompkins:

Q. (Counsel hands document to witness.) Will you examine that closely and tell me whether that is the (274) same birth certificate that the defendant gave you. A. (Witness examines document.)

Yes, this is the same one.

Mr. Tompkins: I will offer it at this time, then, your Honor.

Reino Hayhanen, for Government—Direct.

Mr. Donovan: I will object to it on the ground there has been no testimony as to when and where this alleged meeting took place.

The Court: Is that the only objection?

Mr. Donovan: That is the first one, your Honor. I want to confer with my associates.

The Court: I will deal with them one by one. I hope the other is more important than that.

He has fixed the time generally.

Mr. Donovan: Of this meeting, your Honor?

The Court: Yes.

Mr. Donovan: Your Honor, to the best of my notes, there is no testimony as to either time or place.

The Court: It was after, he says, the defendant returned from Moscow and it was prior to February, 1957. That gives us the earliest and latest dates.

Mr. Donovan: Can we know where this meeting was supposed to take place, your Honor?

(275) The Court: You may, if you will just take it up on cross examination.

He has identified a document that he says the defendant gave him.

Mr. Donovan: I renew that objection but none other, your Honor.

The Court: Objection overruled.

(Birth certificate heretofore marked Government's Exhibit No. 19 for identification was marked and received in evidence.)

The Court: Now, he was talking about a conversation with the defendant who said he could take the first ship, I think, for Europe, and he told you what he found that ship to be.

I think that is where we arrived.

Mr. Tompkins: That is right.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. I think you gave us the name of the ship as Queen Elizabeth. Is that right? A. That's right.

The Court: Yes. And he said it sailed January 31st or February 1, 1957, I think.

(276) By Mr. Tompkins:

Q. Did you relate this information to Mark? A. Yes. I send that information through drop and that drop Mark picked up in Prospect Park in Brooklyn just for this occasion, that I will send a message when and on what ship I will leave New York City.

Q. Do you remember what you said in that message? A. I said in that message that I will leave 31st or—of January—or 1st of February on Queen Elizabeth.

Q. Did you say anything else in the message? A. Let me see.

Yes, and then I said that three men are following me.

Q. I beg your pardon, I didn't get the last answer. A. That, and three men are following me.

Q. Now, after your conversation with Mark, concerning your leave, did you apply for a passport? A. Yes, I did, and I got that passport in December, 1956.

Q. Do you recall when you, to the best of your knowledge, applied for it? A. I applied for it in the end of November or beginning of December, 1956.

(277) Q. Now, you mentioned about sending this message to Mark concerning the Queen Elizabeth? A. Yes.

Q. Did you use a drop for that message? A. Yes, I used a drop for that message.

Q. What drop did you use? A. In Prospect Park, what Mark picked up himself, and it was for magnetic containers.

Q. Had you ever used this drop before? A. No.

Q. Now, I have here Government's Exhibit No. 20 for identification. Will you examine that and if you know what it is, will you tell us what it is?

(Counsel hands photograph to witness.)

Reino Hayhanen, for Government—Direct.

A. (Witness examines photograph.)

This is that drop what I mentioned before, what Mark picked up just for sending a message when I will leave New York City.

The Court: Is that the Prospect Park drop?

The Witness: Yes, it is in Prospect Park in Brooklyn.

By Mr. Tompkins:

Q. Will you put a mark as close to the actual location of the drop as you can, please? (278) A. (Witness marks on photograph.)

Mr. Tompkins: I will offer this at this time, your Honor.

Mr. Donovan: No objection, your Honor.

It is clearly a lovelier scene than Central Park, your Honor.

Mr. Tompkins: I beg your pardon?

Mr. Donovan: I say it is clearly a lovelier scene than Central Park.

By Mr. Tompkins:

Q. Now, did you meet the defendant in the vicinity of this drop subsequently? A. Yes, I met him.

Q. Can you fix a date? A. The 14th or 16th of February, 1957, when he gave me that birth certificate which was shown me just a few minutes ago.

Q. Now, did you have a conversation with him?

The Court: Excuse me. May I hear that answer?

(Answer read.)

By Mr. Tompkins:

Q. Did he give you anything else at that time than the birth certificate? A. Yes. He gave me \$200 for trip expenses.

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(279) Q. Did you have a conversation with him at that time in the vicinity of Prospect Park? A. Yes, we had, and I told that I was questioned by F. B. I. agents and I couldn't leave New York City that date on *Queen Elizabeth* because F. B. I. agents took me off from ship.

Q. How was that meeting set up? Was it through a message? A. Yes. I left a message and—in signal place for Mark. I put number—I cannot remember exactly number which was—I think it was six. It meant sixteenth of February have to meet.

Q. When you arrived— A. And Mark explained that he got—

Q. When you— A. —instructions not to meet me.

Q. When you arrived at the meeting place on that date, did you see Mark? A. Yes, I saw him.

Q. Where was he? A. He was hiding behind bushes and he was checking that nobody was following me.

Q. In connection with your travel to Europe, did you receive any further instructions from the defendant? (280)

A. Like I mentioned before, I got those instructions how to make that phone call in Paris and Mark explained how to use those Paris phones, because they are a little bit different like in New York City, different way of calling.

.. Q. Now, just a little while ago you testified that you sent Mark a message concerning the *Queen Elizabeth*. Is that correct? A. Yes.

(Document was marked Government's Exhibit No. 21 for identification.)

By Mr. Tompkins:

Q. I have here Government's Exhibit No. 21, for identification. Will you explain that and, if you recognize it, will you tell us what it is? Will you do so?

•(Counsel hands document to witness.)

A. (Witness examines document.) This is my handwriting and this is the message what I mentioned before what I sent to Mark.

Reino Hayhanen, for Government—Direct.

Q. Now, you finally decided to go to Europe? A. Yes.

Q. By way of ship to Paris, is that correct? A. That's right.

Q. Now, did you— (281) A. The ship to LeHavre.

Q. To LeHavre. Did you advise anybody of your departure? A. Yes, I did. I sent a message to Soviet officials through drop No. 3, Fort Tryon Park.

Q. And what did you advise them? A. I sent a message that I am leaving New York City, 24th of April, 1957, on the ship *Liberte*.

Q. L-I-B-E-R-T-Y?

The Court: "T-E," I think.

The Witness: "T-E."

By Mr. Tompkins:

Q. *Liberte*, I beg your pardon? A. Yes.

The Court: You said April 24?

The Witness: April.

By Mr. Tompkins:

Q. April 24, 1957? A. That's right.

Q. Now, did you board the ship on April 24, 1957? A. Yes, I did.

Q. Did you arrive at LeHayre? A. Yes, I did. And next day I arrived to Paris.

Q. You mentioned that you had received instructions (282) from Mark in New York what to do in Paris; is that correct? A. That is right.

Q. What did you do pursuant to his instructions? A. I called in Paris by the phone KLE-3341, for my best recollection was the phone number.

Q. You called phone number KLE-3351? A. 3341.

Q. 3341, I beg your pardon.

All right, and what happened? A. And then in Russian I asked the passwords, "Can I send through your

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office two parcels to the U. S. S. R., without Mori Company?" And I got an answer——

The Court: Without?

The Witness: Mori, M-O-R-I, Company.

By Mr. Tompkins:

Q. That is a proper name? A. It is some kind of a firm for sending parcels to the U. S. S. R. in Paris.

(283) Q. And you got a reply to that statement? A. Yes, I got the reply.

Q. Don't tell me what the reply was.

Now, as a result of that reply, what did you do?

Mr. Donovan: I object.

The Court: Well, after receiving the reply he may state what he did, I think, without objection.

By Mr. Tompkins:

Q. After receiving the reply what did you do? A. Then I went to meeting place and I met one Russian official.

Q. What were you wearing? A. I was wearing the same blue tie and was smoking a pipe.

Q. Now, when you met the Russian official, what did you say, if you recall? A. He said passwords, but I cannot recall now which they being, but he told that he recognized me at once by the way I was smoking the pipe, and I had that blue tie with red stripes.

Mr. Donovan: Your Honor, could we have that answer read? I couldn't hear it.

I am sorry.

The Court: Will you read the answer?

(284) (The court reporter thereupon read the last answer.)

Mr. Donovan: I move to strike the answer, as hearsay; not binding on this defendant.

Reino Hayhanen, for Government—Direct.

Mr. Tompkins: I won't oppose that.

The Court: Granted.

By Mr. Tompkins:

Q. You had a blue tie with red stripes on, and you were smoking a pipe? A. That is right.

Q. And did a Russian official approach you?

Mr. Donovan: I object.

The Court: Did someone approach you?

Q. Did someone approach you? A. Yes.

The Court: And did you speak to him?

The Witness: Yes, I was talking to that Russian official.

The Court: Well, now, please, one at a time.

Mr. Donovan: I move to strike the answer.

The Court: You spoke with him? You had a conversation with him?

A. Yes.

The Court: In what language did you converse (285) with him?

The Witness: In Russian.

By Mr. Tompkins:

Q. All right,

Now, how was this person dressed, if you remember?

A. He was dressed in brown overcoat, then brown hat, gray suit.

The Court: What was that?

Mr. Tompkins: Gray suit.

The Court: He didn't say flannel?

Mr. Tompkins: No.

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

Q. Now, as a result of this meeting, what did you do next?

Mr. Donovan: Objection.

Q. Following the meeting? A. We been walking several blocks and then we went to one bar where we been drinking cognac and had a cup of coffee.

Q. Now, what happen after that? A. Then he gave me some money in French francs and in American dollars, two hundred dollars.

Q. What happened next? A. And then he told that—

(286) Q. Not what he told you, just what you did. A. Then we went that—we left that bar and I went to my hotel room.

Q. All right.

Now, did you meet anyone the next day? A. I met him next night because just for visual meeting because I didn't wear—

Mr. Donovan: I object.

The Court: I will allow the witness to state whatever he recalls about his apparel on the occasion that he met the same man the next night.

By Mr. Tompkins:

Q. Will you continue? A. And it was agreed the previous day that if I won't wear a hat and I have any magazine or newspaper in my hand that it means that I am leaving next day, then.

Q. Leaving next day for where? A. For Germany, West Germany, and from there then like by the plane to West Germany, West Berlin.

Mr. Donovan: I object, your Honor, to his stating that he agreed with this other man.

The Court: Sustained.

Reino Hayhanen, for Government—Direct.

Did you meet him on the day following the first meeting that you have referred to?

(287) The Witness: Yes, I did.

By Mr. Tompkins:

Q. Can you tell us, did you have a conversation with him? A. Next day, no. It was just visual meeting without any talking, without even greetings.

Q. Did you see him thereafter? A. No, I did not.

Q. Where did you go after that visual meeting? A. I went again—no, I went to movies and after movies to hotel room.

Q. Now, the next day where did you go? A. The next day I went then to American Legation in Paris.

Q. Now, at any time prior to your going to the American Legation in Paris, did you advise the Russian Embassy of your plan?

Mr. Donovan: I object.

The Court: I will allow it.

By Mr. Tompkins:

Q. You may answer it. A. I couldn't understand your question correctly.

Q. I asked you at any time prior to your going to the American Embassy, did you advise the Russian Embassy of (288) your plan?

Mr. Donovan: I renew my objection.

The Court: Overruled.

A. You mean did I tell to Russians that I would go to American Embassy?

Q. No. Did you tell the Russians of your plans to go to West Germany? A. Yes, I told that I would go to West Germany, and from there to West Berlin and from West Berlin to East Berlin.

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Q. My question is, did you call the Russian Embassy or did you go there? A. No, I never was in Russian Embassy and I didn't call, but once, to Russian officials like I explained before.

Q. I have here Government's Exhibit No. 22 for identification, and will you examine that and see if you can tell us what it is? A. This my new passport what I applied for from New York City and what I used to go to Paris.

Q. In 1957? A. That is right.

Mr. Tompkins: I will offer that at this time, your Honor.

Mr. Donovan: No objection, your Honor.

The Clerk: Exhibit No. 22 in evidence.

(289) (Passport received and marked Government's Exhibit No. 22 in evidence.)

By Mr. Tompkins:

Q. Now, Mr. Hayhanen, I just want to go back for one minute for one question. After Mark returned from Moscow and prior to your departure from the United States, did you ever have a conversation with him concerning Pavlov? A. Yes.

Q. Will you tell us what that was? A. When Mark returned from Moscow and we had that meeting in July or August, 1956 he told that he met Pavlov in Moscow and Pavlov was boss of American espionage section in K. G. B.

Q. That is all he told you? A. Yes.

Q. Now—

The Court: Let me hear that answer, please.

(The court reporter thereupon read the last answer.)

By Mr. Tompkins:

Q. Now, do you remember the date that you went into the American Embassy?

The Court: In Paris?

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Q. In Paris, that is right. (290) A. I cannot remember exactly day, but it was—let me see, first of May I arrived to Paris; it was 4th or 5th of May, 1957.

Q. Now, did you—

The Court: Well, the 4th of May was a Sunday. Does that help you?

The Witness: Then it was—

The Court: No, the 4th was a Saturday. I beg your pardon. And the fifth was a Sunday. The sixth was a Monday.

The Witness: It was not Sunday, it should be four or six, I believe it was fourth of May.

Q. All right.

Now, did you communicate with the Embassy before you went there? A. Yes, sir.

Q. What did you do? A. When I came to Embassy?

Q. When you communicated with them, did you call them on the telephone? A. No, I did not.

Q. You went into the Embassy? A. Yes.

Q. What happened thereafter? (291) A. Well—

Q. What did you do?

Mr. Donovan: I object, your Honor.

The Court: Overruled.

By Mr. Tompkins:

Q. After you went to the Embassy what did you do? A. I explained that I am Russian espionage officer in rank of Lieutenant-Colonel and I have some information what I like to give to American officials to help.

Mr. Donovan: Your Honor—

Mr. Tompkins: I think the witness is entitled to finish.

Mr. Donovan: I respectfully move that what he has testified to at the moment be stricken from the

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record, that he not be permitted to testify further on the ground that clearly he had left the conspiracy at this point, if he was ever in one.

Mr. Tompkins: I don't think there is much doubt he was in one from the evidence, your Honor.

Mr. Donovan: Now, I ask that Mr. Tompkins' remark be stricken.

The Court: You see, the trouble is you make a remark and you don't like him to reply to it, that's the trouble.

(292) Mr. Donovan: I made a legal objection on a perfectly clear ground.

The Court: Well, I am not sure that you are right.

The indictment alleges that the conspiracy started from about 1948 and continuously until the filing of the indictment.

Unfortunately, I can't give you that date, but I think it was in September of 1957.

Now, then, whether this witness continued in the conspiracy or not, nobody knows at the present time.

From certain remarks that you made in your opening, it could be that he was less than candid in what he says he stated in the American Embassy.

I can't go along with your objection.

It does not yet appear that he had left the conspiracy, if he ever was in it.

August the 7th is the date of the filing of the indictment, and we are dealing, I think, with May 6th or May 4th.

Mr. Donovan: Exception.

These statements are all self-serving.

Mr. Tompkins: Self-serving, it seems to me it is (293) just a recital of what the witness did.

I don't understand self-serving.

The Court: I don't understand that that is a legal objection.

I think that it is just a comment.

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Q. Now, at the time that you went in the American Embassy and conferred with these officials, did you give them anything? A. Yes, I gave as proof Finnish five marks coin which I explained is a container, that is made from two coins.

Mr. Donovan: Your Honor, may I have a continuing objection to whatever transpired in the Embassy so I won't repeatedly object?

The Court: I think it can be so understood, Mr. Donovan.

Mr. Donovan: Thank you.

By Mr. Tompkins:

Q. Now, I have here Government's Exhibit No. 23 for identification; can you look at that and tell me whether you can identify it? Will you take it out of the container? A. Yes, this is the container what I gave in Paris Embassy.

The Court: You mean container or coin?

The Witness: Is coin container, is hollow from (294) inside.

Q. Is there any reason why you can—any particular reason why you can identify that coin? A. On A, there is hole, if you punch with needle you can open this container.

Mr. Tompkins: We will offer that at this time, your Honor.

Mr. Donovan: Objection, on the same ground, your Honor, and the additional ground that there has been no showing that it is connected with the conspiracy.

The Court: On the present stage of the record, why is that admissible against the defendant?

Mr. Tompkins: Well, now, if your Honor please, may I ask a couple of more questions?

The Court: Yes.

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By Mr. Tompkins:

Q. Where did you receive this coin? A. I received it from Asko.

Q. From Asko? A. Yes.

Q. That was the courier you mentioned? A. Yes, that is right.

Q. Now, did you use coins similar to this in drops?

(295) Mr. Donovan: Objection.

The Court: Have you ever seen a coin like this?

The Witness: Yes, I saw several coins, first five marks, then fifty marks coins, and fifty cents coins, twenty-five cents coins.

By Mr. Tompkins:

Q. Did you use those coins that you have mentioned? A. I used some of them.

Q. Now, did you ever discuss the use of coin containers with Mark, the defendant? A. Yes, and Mark gave me as a matter of fact five one-cent coin containers.

The Court: I didn't hear that.

The Witness: One-cent coins, five of them, and they will be containers.

Mr. Tompkins: Now, if your Honor please, the witness has testified that he received this from Asko, a courier, and a co-conspirator, and he is also or he has also testified to the use of coins and devices of this type as part of it and in furtherance of the conspiracy.

Mr. Donovan: I renew my objection.

The Court: Would you object if this were offered merely as a sample of the kind of coin that he has (296) testified to about?

Mr. Donovan: Furthermore, it is a coin in the possession of a co-conspirator who has admitted participating in the conspiracy and it is admitted.

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the type of devices used in the furtherance of the conspiracy.

I renew my objection.

(297) The Court: Overruled.

Q. Now, after your conversation in the embassy, what did you do? A. I went to hotel room where I was living in Paris.

Q. Did you return to the embassy the next day?

Mr. Donovan: I object to the question, your Honor.

The Court: I will allow it.

Mr. Donovan: Pardon me? Did you rule, your Honor?

The Court: I will allow the question. Objection overruled.

Mr. Donovan: Well, your Honor, if his previous testimony is permitted to stand in the record, then clearly he has left the conspiracy.

The Court: I am sorry, I can't agree with you that the evidence has yet shown that he has left the conspiracy, Mr. Donovan. I will admit that what he says took place would be consistent with leaving the conspiracy, but I think it would also be consistent if your description of this individual is correct, with a desire to continue in the conspiracy for purposes of his own.

I don't want to be any more plain about it than (298) I am not.

I don't think that it yet appears that he has left the conspiracy.

Mr. Donovan: Your Honor, you don't leave a conspiracy like this, by handing in a signed resignation.

It seems to me that if a man goes to the American Embassy and tells such a story as he has been tell-

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ing and passes over a container that there couldn't be any clearer way.

Mr. Tompkins: What he is saying is he would rather believe the witness now, but on the other testimony he wouldn't.

Mr. Donovan: No.

The Court: Don't argue the thing indefinitely. Rightly or wrongly, it is my belief that this witness' departure from or withdrawal from the conspiracy has not yet been shown.

Mr. Donovan: I renew my objection, your Honor.

The Court: All right.

By Mr. Tompkins:

Q. I think the last question——

The Court: You asked if he went to the legation the next day, after having returned to his hotel.

The Witness: I cannot remember exactly whether it was the next day or day after.

Q. Now, on the times that you went to the American Embassy, did you have conversations with American officials? A. Yes, I had.

Q. And did you tell them of your activities in the United States? A. Yes, I did.

Q. Now, thereafter, did you return to the United States? A. Yes, I did.

Q. And how did you return? A. By plane from Paris to New York City.

Q. Do you recall roughly the date that you got back to the United States? A. I believe it was 11th of May, 1957.

Q. Now, subsequent to your return to the United States, have you received any financial assistance from the American Government, United States Government?

Mr. Donovan: Same objection.

The Court: I will allow it.

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By Mr. Tompkins:

(300) Q. Will you answer the question? A. Yes, I did.

Q. Now, you say to the best of your recollection you got back here on May 11, 1957, is that correct? A. Yes.

Q. Did you meet with representatives of the F. B. I.? A. Yes, I did.

Q. And did you tell them about your activities? A. Yes, I did.

Q. Now, did you tell the F. B. I. about your drops?

Mr. Donovan: I object, your Honor, all these questions are leading.

The Court: Now, just a minute.

Mr. Donovan: They are all leading, your Honor.

Mr. Tompkins: I can ask him to go through this entire story again, your Honor, if that is what Mr. Donovan wants.

The Court: You see, what I am concerned with is the line of decisions that have to do with admissions made by a co-conspirator after the conspiracy is over.

That is what I am concerned with.

Mr. Tompkins: I will withdraw that question and just ask a specific question.

(301) By Mr. Tompkins:

Q. Did you tell the F. B. I. of the location of Prospect Park drop 1?

Mr. Donovan: Objection.

The Court: It strikes me that any statement made by this witness to the F. B. I. after the conspiracy came to an end is not a proper subject of inquiry.

Mr. Tompkins: All right, your Honor. I will withdraw the question.

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By Mr. Tompkins:

Q. Did you give the F. B. I. permission to search your home? A. Yes, I did.

Mr. Donovan: Objection.

The Court: I don't think that has—that is an objectionable question.

Mr. Donovan: It is certainly leading, your Honor.

The Court: Yes, but you know all leading questions are not harmful, you realize that, don't you?

By Mr. Tompkins:

Q. And did you give them a sketch of your home? (302)
A. Yes, I did.

The Court: I think you are on thin ice.

Mr. Tompkins: All right, your Honor.

By Mr. Tompkins:

Q. I have here Government's Exhibit 24, marked for identification. Will you examine that and tell us what that is, if you know? A. This is short wave radio, what I received from Mark.

Q. Where did you put it? A. I left it in our Peekskill home.

Mr. Tompkins: I will offer that at this time.

Mr. Donovan: Your Honor, will the Government stipulate that this is a perfectly ordinary short wave radio that can readily be purchased in any large radio store?

If so, I will make no objection.

Mr. Tompkins: I don't think the Government would characterize it as such, your Honor.

The Court: Can you go so far as to say that short wave radios are articles of commerce and were in May of 1956—when was it?

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Mr. Donovan: Your Honor, I am the last one in the courtroom to answer that question.

The Court: When did you get this?

(303) The Witness: I got this in May, 1955.

The Court: Can you agree that in May, 1955, such devices were ordinary articles of commerce?

Mr. Tompkins: To be purchased on the market.

The Court: And purchased on the market.

Would that serve your purpose?

Mr. Donovan: Yes, your Honor, and could he be asked whether he knows anything special in connection with this?

In other words, no change has been brought in on that that would enable it to do anything?

The Court: I don't know whether he is competent to answer that. He doesn't know anything about radios any more than I do.

Mr. Donovan: I think he does.

Mr. Tompkins: I will ask him.

By Mr. Tompkins:

Q. Was any change made in this radio? A. No, I didn't make any changes and I am not a radio expert, so I cannot tell about it.

Mr. Donovan: No objection.

Q. I have here Government's Exhibit 25 for identification. Will you examine this if you can identify it and tell us what it is? (304) A. They belong to the same radio what you showed me.

The Court: Is it a hearing device? How would you describe it?

Mr. Tompkins: Ear phones?

The Witness: Yes, they are.

Mr. Tompkins: I am not a radio man either, your Honor.

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Is that satisfactory, Mr. Donovan?

Mr. Donovan: No objection.

The Court: Were they delivered with the radio itself?

The Witness: Yes, they been.

Mr. Tompkins: I think the trade name is head phones.

The Clerk: Radio marked Government's Exhibit 24 in evidence and head phones marked Government's Exhibit 25 in evidence.

Q. I don't recall whether I asked you about giving the Bureau authority to search your home, whether I asked you whether it was your home in Peekskill? A. Yes.

Q. Was it your home in Peekskill? A. Yes.

Q. I have here Government's Exhibit 26 for identification. Without considering this label on here, this piece of white paper which just has some markings, would you examine that and tell us if you can recognize it and if so, what it is? A. Yes, I do, and this is copper plate and microscope lens for making micro-dots.

Q. Where did you get that? A. This lens I got from Mark and this copper plate I bought myself and made this the way Mark explained to me.

Q. Now, if you know, do you know where Mark got the lens? A. No, I don't.

Mr. Tompkins: At this time, your Honor, I would like to offer it with the exception of this identifying piece of paper.

Mr. Donovan: I objected once, your Honor, on the ground that there has been no testimony as to when or where this witness received this.

The Court: Would you ask him when he got it, please?

By Mr. Tompkins:

Q. When did you get it, do you remember? A. I got it in the end of 1954, it was in November or December.

Reino Hayhanen, for Government—Direct.

(306) The Court: That is, as to the copper plate, is that so?

By Mr. Tompkins:

Q. Is that the copper plate or the lens? A. The lens I got from Mark and about the same time I bought that copper plate too.

The Court: Oh, you bought the copper plate; but he gave you the lens, the microscope?

The Witness: Yes, he gave me that microscope lens.

The Court: And he gave you that in November or December of 1954, is that right?

The Witness: Yes, that is right.

The Court: Now, when did you buy the copper plate?

The Witness: When or where?

The Court: When?

The Witness: About the same time when I got that lens.

The Court: And do you know where?

The Witness: No, I cannot remember exactly on which store I bought it.

The Court: Now, the objection is withdrawn, is it? So far as the microscope is concerned?

(307) Mr. Donovan: Yes, your Honor. As I understand his testimony is a store, an ordinary public store where he bought this, is that correct?

The Witness: Yes.

By Mr. Tompkins:

Q. Is that correct? A. Yes.

Q. How about the lens—oh, you got those from Mark? A. Yes.

Q. Do you remember where you were when you got it from Mark? A. Mostly when I was getting—mostly those talks what I was getting from him.

Reino Hayhanen, for Government—Direct.

Q. No. I think you misunderstood my question. Where were you? Where did Mark give you the lens?

The Court: Were you in the car when he gave it to you?

The Witness: Yes, in the car.

The Court: Do you know where the car was?

The Witness: I cannot recall right now where it was, but we were traveling a lot just around driving.

Mr. Donovan: No objection.

(308) The Court: Is everybody supposed to know what micro-dots are?

By Mr. Tompkins:

Q. I will ask the witness, your Honor.

Can you tell us what a micro-dot is? A. A micro-dot is very very small photo copy of certain document or certain message. It is about one by one and a half or two millimeters in size. That is why they call it dot.

The Court: That is a copy of a document you say, or a message?

The Witness: Yes.

The Court: Do you accept that definition?

Mr. Donovan: Yes, your Honor.

By Mr. Tompkins:

Q. Maybe I can ask the witness which will enable him to explain it a little better, if you took a picture of the front page of an average newspaper— A. Yes.

Q. —would you reduce it to the size of a dot and superimpose it on a dot? A. Yes.

Q. In other words, it is a reduction? A. Yes.

(309) Q. Now, one more question on micro-dots. Is there any special type of film required to make micro-dots? A. That is right. That film should be very fine grade and

Reino Hayhanen, for Government—Direct.

I had received from Mark special film, spectroscopic film, what he ordered from some Kodak laboratory.

Q. I have here Government's Exhibit 27 for identification. If you can, tell us what that is. That is without the front label. A. Yes, this is the film what I mentioned before.

The Court: That is a film that is used in the making of micro-dots?

The Witness: That is right.

By Mr. Tompkins:

Q. Is that any of the film which you say you received from the defendant? A. Yes, that is right.

Q. How many boxes did you receive? Do you recall? A. I received five boxes of them, but then when Mark returned from Moscow he asked for some film and I returned to him two or three boxes of it.

Mr. Donovan: Again, your Honor, do I understand that the Government would stipulate that this is made by the Eastman Kodak Company and may be purchased on the ordinary market?

(310) Mr. Tompkins: I don't like to quibble, your Honor. This is film that is not readily obtainable on the market.

Mr. Donovan: It is obtainable to anyone who wants it?

Mr. Tompkins: You and I could buy it, I will agree to that.

Mr. Donovan: All right, that is what I am trying to establish.

Mr. Tompkins: I don't dispute that.

The Court: But you wouldn't say that purchases are confined to you and Mr. Donovan?

Mr. Tompkins: No, sir.

The Clerk: Exhibit 27 in evidence.

Reino Hayhanen, for Government—Direct.

(Box of film marked Government's Exhibit No. 27 in evidence.)

Mr. Tompkins: I would like to go back a minute, your Honor, mainly because we didn't have the tools in court.

By Mr. Tompkins:

Q. I would like to have the witness demonstrate for the jury how this five mark coin opens. He explained how it opens, but I don't think he did it.

The Court: That is Exhibit 23, I think.

(311) (Mr. Tompkins then handed to the witness Exhibit 23 together with a needle.)

A. Just to punch the hole and it opens.

(The witness proceeded to open the coin.)

Mr. Donovan: Your Honor, will the Government stipulate that similar devices are readily obtainable in magician supply shops and various similar stores?

Mr. Tompkins: Your Honor, I have never seen anything like this in my life.

Mr. Donovan: That isn't what I asked, your Honor.

(312) Mr. Tompkins: I honestly don't—I don't think they are obtainable any place.

The Court: I don't think that Mr. Donovan request is germane to the present stage of the examination.

You have asked the witness to demonstrate how this Exhibit No. 23 can be opened; and you supplied him with a needle or a pin.

Mr. Tompkins: A steel needle.

The Court: And he demonstrated. Now, I suggest that you re-assemble it and let the jury look at it, perhaps they would like to experiment with it.

Reino Hayhanen, for Government—Direct.

In the meantime, you find out if Mr. Donovan is well informed as to his source of supply, I don't think it is important.

Q. Now, this morning, you testified I believe that you received two papers from the defendant, one on color photography and one on the use of vacuum board for making matrices; is that correct? A. Yes.

Mr. Tompkins: I think I will offer them separately.

The Court: Exhibit No. 28 and 29 for identification.

(313) I think Exhibit No. 27 was received in evidence without objection, is that so?

Mr. Tompkins: That is right.

The Court: You gentlemen stipulated that you and Mr. Donovan can buy the film.

Mr. Donovan: Your Honor, one thing I am not clear on with respect to the coin, is the Government offering in evidence the steel needle that was used?

Mr. Tompkins: No, that is the only way to open it.

The Court: You say these are papers. The witness says these are papers delivered to him by the defendant?

Mr. Tompkins: Received from Mark; that is right, sir.

By Mr. Tompkins:

Q. I have Government's Exhibit No. 28 for identification; will you look at that and tell us, if you can, what it is? A. This is one of instructions what Mark gave me about separation negatives and this handwriting is his, what is over here handwritten.

The Court: Well—

Reino Hayhanen, for Government—Direct.

By Mr. Tompkins:

(314) Q. This is Government's Exhibit No. 29 for identification. A. That is another instructions of the use of vacuum board for making matrices which Mark gave me.

The Court: I didn't get that answer, will you give it to me, please?

(The court reporter thereupon read the last answer.)

Mr. Donovan: Do I understand, your Honor, that the Government is not offering these as to content?

Mr. Tompkins: Well, we will furnish the defendant with copies of these. It seems to me that we can go into them in the morning. We are not going to read them as to content to the jury at this time.

The Court: You are offering them as papers which the witness says that he received from the defendant?

Mr. Tompkins: That is right.

The Court: Is there any objection?

Mr. Donovan: With that clarification, your Honor, there would not be, except that I understood the witness to testify that some handwriting that is on one of these papers is the defendant's handwriting.

The Court: He did.

He said on Exhibit 28.

(315) Mr. Donovan: I respectfully object on the ground that no proper foundation for any such statement has been laid.

The Court: You mean that he cannot identify the defendant's handwriting?

Mr. Donovan: He might under proper examination and testimony.

The Court: Did you see the defendant put that pencil writing on Exhibit No. 28?

Reino Hayhanen, for Government—Direct.

The Witness: I didn't see that, but when I was getting some instructions about color photography, I noticed Defendant's handwriting, that is why I compared and that is why I know his handwriting.

Mr. Donovan: I renew my objection.

By Mr. Tompkins:

Q. Have you seen the defendant's handwriting? A. Yes.

Q. Have you seen it on a number of occasions? A. Yes, I did.

Q. And does this handwriting appear to be the defendant's handwriting? A. Yes, I recognize it.

The Court: Objection overruled.

Mr. Donovan: Exception.

(316) Could we have him asked, your Honor, whether or not he has actually seen the defendant writing?

The Court: Yes.

Did you ever see the defendant write?

The Witness: Yes. I saw him several times.

The Court: Objection overruled.

(321) Q. Mr. Hayhanen, yesterday you testified that you and the defendant had buried five thousand dollars in Bear Mountain Park and that the purpose was to transmit the \$5,000 eventually to Mrs. Sobell. Is that correct? A. That's right.

Q. And you also testified you did not transmit (322) that money, isn't that correct? A. I did.

Q. Will you tell us what you did with it? A. I kept it myself.

Q. Now, after the defendant returned from Moscow—

The Court: Now, let me see. Didn't he testify that he had buried it?

Mr. Tompkins: They buried it together, your Honor.

Reino Hayhanen, for Government—Direct.

The Court: Yes.

How could he both keep it and bury it? That's—

Mr. Tompkins: He was instructed, as I recall, to turn over the money to Mrs. Sobell by the defendant when the defendant left this country.

The Court: Yes.

Mr. Tompkins: And the witness³ says he did not do so.

By Mr. Tompkins:

Q. Did you dig up the money? A. Yes, I digged them out and I kept them myself.

Q. After the defendant returned from Moscow, there was another discussion concerning the \$5,000 for Mrs. Sobell. Isn't that correct? A. Yes, it is.

(323) Q. Do you know whether that money was transmitted to Mrs. Sobell?

The Court: Do you know what?

(Record read.)

The Witness: No, I don't.

By Mr. Tompkins:

Q. Now, yesterday afternoon you also testified, as I recall, that you had told the defendant that you were being trailed by F. B. I. agents. Is that correct? A. Yes, I told him so.

Q. Now, was that true or not? Were you? A. No, it is not.

Mr. Tompkins: Your Honor, I couldn't hear the answer.

Mr. Donovan: He said, "No, it is not."

He couldn't hear the answer.

The Court: I didn't understand—and you correct me—I didn't understand that he mentioned F. B. I.

Reino Hayhanen, for Government—Direct.

He said that he was followed by three men.

Mr. Donovan: Three men.

The Court: Did he say F. B. I. men?

Mr. Tompkins: My recollection—I don't—

Mr. Donovan: No, I don't believe so, your (324) Honor.

I don't know how he could testify to F. B. I. agents unless they were actually agents.

By Mr. Tompkins:

Q. You told the defendant that you were trailed by three agents or three men; is that correct? A. That's right.

Q. Was that true? A. No, it is not.

Q. Now, you also testified yesterday concerning the use of the Prospect Park Drop No. 1? A. Yes.

Q. Did you use that drop? A. Yes. I was using it.

Q. Did you use it right up until May of 1957? A. No. It was—somebody put some cement on that hole, and it was closed so nobody could use it.

Mr. Tompkins: Will you mark this and also this, separately?

(A notebook was marked Government's Exhibit No. 30, for identification.)

(A screw was marked Government's Exhibit No. 31, for identification.)

By Mr. Tompkins:

(325) Q. While these are being marked, you testified when you came to this country you were a major, is that correct? A. That's right.

Q. And, as I recall your testimony, you testified that you disembarked from the Queen Elizabeth in 1952? A. No. Queen Mary.

Q. Queen Mary, all right.

Now, did you subsequently get a promotion? A. Yes. Later I got promotion to Lieutenant-Colonel.

Reino Hayhanen, for Government—Direct.

Q. How did you learn of that promotion? A. Mark told me about that promotion, and I got the message from Moscow with greetings, and that message was also announced that I got promotion.

Mr. Donovan: Your Honor, could we have the time, the place of the message first?

By Mr. Tompkins:

Q. Can you fix a time and place? A. I got that message through our Fort Tryon Park No. 3, that drop No. 3.

Let me see. It was in January, 1956.

Q. When did you have your conversation with Mark concerning your promotion? A. I had conversation about it—let me see—when we (326) met after he returned from Moscow.

Q. Now, I have here Government's Exhibit No. 30, for identification.

Will you examine it, and if you know what it is, will you tell us what it is, please?

(Counsel hands notebook to witness.)

A. (Witness examines notebook.)

This is my notebook.

Mr. Tompkins: I would like to offer that at this time, your Honor.

His notebook, he said.

Mr. Donovan: The defense would object to this, your Honor, as being completely irrelevant, immaterial, and not binding on the defendant.

Mr. Tompkins: Now, if your Honor please, we will—the prosecution can tie this in to the conspiracy.

The Court: What?

Mr. Tompkins: The prosecution can tie this exhibit in to the conspiracy, your Honor.

The Court: You think—

Reino Hayhanen, for Government—Direct.

Mr. Donovan: Objection, your Honor.

The Court: At present it contains anything which is binding on the defendant, in the present state of the record?

(327) Mr. Tompkins: No, it doesn't your Honor.

May I question the witness further on it?

The Court: Surely.

Mr. Tompkins: All right.

By Mr. Tompkins:

Q. Mr. Hayhanen, are any pages torn out of that book? Will you examine it and tell us whether there are or not?

A. Yes, there are several pages torn out.

Q. Do you know how all or any of those pages were torn out? A. I cannot remember how all of those pages are torn off, but I remember that from this notebook I torn at least one page to send in short message to Mark.

Q. You tore out at least one page to send a short message to Mark? A. Yes.

Q. Did you send it to him? A. Yes, I sent it to him.

Q. How did you send it to him? A. I sent it like I explained yesterday, through that drop in Prospect Park with magnetic container.

Mr. Tompkins: Now the Government again offers the book in evidence, your Honor.

(328) Mr. Donovan: I renew my objection, your Honor, on the ground that there has been no showing that any pages have been torn out of this book in the presence of the defendant, or, indeed, that any such pages even exist.

Mr. Tompkins: The witness has examined the book, your Honor, and said there is a page torn out.

We do not offer the book for its contents. We are simply offering the book to show the torn-out page and the type of paper.

Mr. Donovan: They are offering the book, your Honor, for what isn't in it, and I respectfully object.

Reino Hayhanen, for Government—Direct.

The Court: Suppose the witness were to testify that he sent such a message in writing on a piece of paper which is not present in court? How would that help us?

Mr. Tompkins: The witness is testifying he wrote a message——

The Court: Yes.

Mr. Tompkins: —to the defendant on a piece of paper from that book.

We will produce the message.

The Court: I think that at that time the book (329) might be relevant. I don't think that it is now.

Now, I shall either sustain the objection or you may withdraw the offer.

Which is it?

Mr. Tompkins: I will withdraw the offer, your Honor.

By Mr. Tompkins:

Q. Now, I have here, Government's Exhibit No. 31, for identification. Will you examine that? If you know what it is, tell us what it is?

(Counsel hands screw to witness.)

A. (Witness examines screw.)

This is a container made from old screw.

The Court: Made from?

(Answer read.)

By Mr. Tompkins:

Q. Is that the type of container that you used? A. Yes, it's the same type of container what I was using, too.

Q. And did you have containers of that type in your home? A. Yes. I had the same type.

Reino Hayhanen, for Government—Direct.

The Court: Does this testimony mean that this is such a container as he used for enclosing a message (330) sage and putting it in a drop?

Is that what this means?

Mr. Tompkins: That is correct.

The Witness: That is right.

Mr. Donovan: Is this being offered in evidence, your Honor, at this time?

Mr. Tompkins: Not at this time.

(331) (Converter was marked Government's Exhibit No. 32, for identification.)

By Mr. Tompkins:

Q. Now, I have Government's Exhibit No. 32, for identification. Will you examine that, and, if you know what it is, tell us what it is?

(Counsel hands converter to witness.)

A. (Witness examines converter.)

This is a converter what converts six volts electricity to one hundred ten volts by plugging into the car, into cigarette lighter.

Q. Is that the same type converter that was used in the Croton Reservoir? A. Yes, it is the same kind.

Mr. Donovan: I object, your Honor.

The Witness: Same type.

Mr. Donovan: Unless it can be shown that this is the container that the witness is talking about.

The Court: You object to his testimony that it is the same kind of container?

Mr. Donovan: I do, your Honor. I think that it is wholly irrelevant.

The Court: I am sorry.

Mr. Donovan: Irrelevant to the proceedings, and (332) not binding on the defendant.

Reino Hayhanen, for Government—Direct.

The Court: I don't know why you should. No offer is before the Court.

He says this is a type of container such as he used.

Mr. Donovan: Your Honor, I respectfully ask that his answer be stricken from the record.

The Court: Denied.

Mr. Tompkins: Did the witness use the term "container"?

The Witness: Pardon?

By Mr. Tompkins:

Q. Did the witness use the term "container"? A. Converter.

The Court: Converter. If I used the word "container," excuse me. I was wrong.

Mr. Tompkins: We are not offering it at this time, your Honor.

(Camera was marked Government's Exhibit No. 33 for identification.)

By Mr. Tompkins:

Q. Now, I have here Government's Exhibit No. 33 for identification. Will you look at that? Do you recognize it and will you tell us what it is, please?

(333) (Counsel hands camera to witness.)

A. (Witness examines camera.)

This is exact camera what I got from Mark before he left. It was in—at springtime, 1955, when he gave me it.

Mr. Tompkins: The Government will offer it at this time.

Mr. Donovan: Could I have the answer read, your Honor?

The Court: I am sorry.

Reino Haghanen, for Government—Direct.

Mr. Donovan: Could I have the answer read?
The Court: Surely.

(Answer read.)

Mr. Donovan: Your Honor, insofar as I could determine from a casual inspection of it, this would appear to be a perfectly ordinary camera, procurable anywhere, and if it were given, I respectfully object to its admission into evidence as completely immaterial.

The Court: Overruled.

(Whereupon the camera heretofore marked Government's Exhibit No. 33 for identification was marked and received in evidence.)

(Document was marked Government's Exhibit No. (334) 34, for identification.)

By Mr. Tompkins:

Q. I have here Government's Exhibit No. 34 for identification. Will you examine that? If you know what it is, will you tell us what it is (counsel hands document to witness.) A. (Witness examines document.)

Q. I am referring to the small piece of paper. A. This small piece of paper is Asko's handwriting, and it means that he wanted to meet me twenty-eighth of February at 19 o'clock, or ten of March at seven o'clock, he means it to, or eleventh of March at twelve-thirty.

Mr. Donovan: Objection, your Honor, to the witness stating what it means.

The Court: I didn't hear the first part of the answer.

Will you read it, please?

(Answer read.)

Mr. Tompkins: If your Honor please, the Government offers this only to prove the handwriting and the content.

- Reino Hayhanen, for Government—Direct.

It will connect it up with another witness.

Mr. Donovan: Your Honor, the man is testifying (335) as to the contents of a document that is not in evidence, and I respectfully ask that his answer be stricken.

Mr. Tompkins: Not offering it in evidence?

The Court: As to the contents, it is not properly in reply to your question.

I will strike so much of the answer.

He says that it is a piece of paper in the handwriting of Asko. As to that, the answer may stand.

(336) The Court: Are you going to ask the witness whether he ever saw that paper before, and if so, how it came into his possession?

Q. Have you ever seen this paper before? A. Yes, I did.

Q. When did you see it? A. One of the F. B. I. agents showed it to me.

Q. Now you testified yesterday that the defendant and yourself had conversations relating to micro-dots, is that correct? A. That is right.

Q. Will you tell us whether you ever received from the defendant any information, written information, relating to micro-dots? A. Yes, I did.

Q. Will you tell us about that, please? A. It was after—at the end of 1954, November or December, when Mark gave me two small pieces of paper explaining how to prepare microfilm for making micro-dots from stripping film.

Q. Will you tell us what you mean by stripping film? A. Stripping film, you can get it from any photo store, and you can strip off that part of film which—you can strip off film from that cellophane.

(337) Q. Now, did you have any further conversations with him concerning micro-dots? A. Yes. He explained how to make micro-dots, different ways like it was explained to me in Moscow, easier way.

Reino Hayhanen, for Government—Direct.

He explained to me that I can use as source of light photo enlarger and like yesterday already I explained that piece of copper with that microscope lens.

Then, later, he explained that it would be easier and quicker to prepare micro-dots by using, as a source of light, projector and by using the same lens, but in horizontal position, that projector and then vertical stand will be that microscope lens and by using special film what I explained yesterday.

Q. Do I understand that you learned in Moscow to make micro-dots by a vertical method? A. Yes, I did.

Mr. Donovan: I object, your Honor.

The Court: Overruled.

By Mr. Tompkins:

Q: And that the defendant suggested a horizontal method of making micro-dots? A. Yes, sir, he told it is more convenient and quicker.

Q. Now, did you transmit micro-dots on any occasion yourself? (338) A. I got the instructions from Mark to practice on making those micro-dots the way he showed me and that I was practicing in 1954-1955 winter.

Q. Did you ever show him the results of your practicing? A. Yes, I did.

Q. Did you have a conversation with him at the time? A. Yes, I did.

Q. Will you tell us what that conversation was? A. Conversation was that he explained to me that I didn't get good enough results, that he was getting better and more contrasting micro-dots, so I was practicing more, later.

Q. Do you know whether the defendant transmitted micro-dots? A. Yes, he did.

Q. Would you— A. And he showed his own micro-dots, his own results.

Q. Do you know the method by which he transmitted micro-dots? A. He transmitted by the same method as he explained to me.

Reino Hayhanen, for Government—Direct.

Q. Well, what method is that? A. It is by using projector as source of light.

(339) Q. Do you know whether he mailed any of these micro-dots? A. Yes, I know, by his own words.

Q. What did he tell you? A. He told me that he is sending micro-dots by mail to Paris, France.

Q. Was he sending them by letter? A. No, he was sending them inside of magazines.

Q. Will you explain what he told you, how he sent them, if you know? A. Without magazine it is difficult for me to explain. But he put those micro-dots, he glued them inside where magazine is. How you call them—

Q. Stapled? A. Stapled, yes, he just wrote where staple was. He wrote that those micro-dots and then he stapled it back again and nobody could recognize because nobody would look in between stapling.

Q. Now, do you know what kind of or type of magazine he used? A. He was using Better Homes, then and American Home. There is two types he mentioned to me.

Q. Do you know whether he actually transmitted any of these micro-dots by this method? Whether he actually (340) sent them? A. When?

Q. Whether he did. Did he ever tell you he did? A. Yes, he told that he was sending several times.

Mr. Tompkins: Now, if your Honor please, there is just one more specialized area that I am going to ask Mr. Maroney to conduct.

Mr. Donovan: Before we enter this specialized area, whatever it is, may I respectfully point out we have had no identification of even an approximate time or the place when these discussions were supposed to have taken place.

The Court: Where the conversations took place?

Mr. Donoyan: And even approximately when, your Honor.

There is no testimony on the point.

Reino Haghanen, for Government—Direct.

Mr. Tompkins: I think he testified, your Honor, that his first conversation was in 1954 on micro-dots with the defendant.

The Court: That is what I understood.

Mr. Donovan: That is the only testimony, your Honor, at which time as I understood—

The Court: November or December of 1954 when he received the original instructions.

(341) Mr. Donovan: That is correct.

The Court: As to other conversations I don't think the time has been stated.

Mr. Donovan: There has been no time stated.

By Mr. Tompkins:

Q. Will you give us a time when you had a conversation with the defendant about sending micro-dots? A. Like I mentioned already, several conversations been in November or December of 1954.

Q. Did you have conversations after that? A. Yes, after that, beginning of 1955 we been talking about sending micro-dots to Paris and—

Q. Did you have subsequent conversations? A. Let me see. I believe it was in March, 1955, we—when Mark explained that that person didn't get that magazine where he sent those micro-dots.

Q. Did you have conversations after that on micro-dots? A. Yes, we had one more conversation. I believe it was before June, 1955 that Mark told that he got message from Moscow that not to send any more of those micro-dots to that address because they did not find what happened to those magazines.

By Mr. Maroney:

(342) Q. Now, sir, I believe you previously testified that in 1952 you received crypto training in Moscow before coming to the United States. Is that correct? A. Yes, it is.

The Court: What is that word, please?

Mr. Maroney: Crypto.

Reino Haghaugen, for Government—Direct.

The Court: C-R-Y-P-T-O?

Mr. Maroney: Yes.

By Mr. Maroney:

Q. Would you state how long that course in crypto training was at that time? A. It was about two and a half or three weeks.

Q. And had you previously had crypto training? A. No, I did not.

Q. Now, following the completion of your training in Moscow, in 1952, were you assigned a code? A. Yes, I was.

Q. Was that your own code or was it a general code? A. Like it was explained to me, it was just code for me to send messages to Moscow and to receive messages from Moscow.

Q. In other words, no other agents had that particular code, is that correct? A. No. That is right.

(343) Q. Now, following your initial entry into the United States in 1952, did you use your code in communicating with the Soviet superiors? A. Yes, I did.

Q. Did you from time to time receive messages in code, in your code, from your Soviet superiors? A. Yes, I did.

Q. Now, would you describe in what manner you received such messages, generally? I am trying to find out if you received a coded message orally or did you receive it in some other fashion? A. I was getting them on film and those messages, they contained just plain numbers.

Q. In other words, you would get a coded message in numbers on film? A. Yes.

Q. Would the film be handed to you by someone or how would you get it? A. I was getting them through drops.

Q. When you received the film in drops, was it exposed or was it in something? A. Sometimes I would get messages that they been already exposed; sometimes I was—several times, two or three times I got undeveloped film.

Rivno Haghaenen, for Government—Direct.

(344) Q. Did you at any time receive coded messages in containers such as you have previously described? A. Yes, I did.

Q. During the time that you were in the United States from 1952 until 1957 when you left for Europe, could you give us an estimate as to how many messages you received in code, to the best of your knowledge? A. My best recollection, I was receiving about one message in one and a half to two months.

Q. So that you might have received in the neighborhood of ten messages a year, is that the approximate figure?

A. No, approximately six or seven messages a year.

Q. So that during the approximate four and a half to five years that you were in the United States on that occasion, you would have received thirty to thirty-five messages? A. About thirty, yes, about thirty messages.

Q. Could you estimate how many messages you sent in code? A. I sent about twenty-five messages.

Q. Have you prepared in your own handwriting charts which demonstrate the application of your code to messages? A. Yes, I did.

Q. I show you what has been marked as Government's (345) Exhibit 35 for identification and ask you if you can identify that. A. This is my handwriting and I prepared this for myself.

The Court: What is it?

The Witness: This is my code, explain how to cipher a message by my code.

By Mr. Maroney:

Q. Now, do I understand that this is a hypothetical message that you were using for demonstration purposes?

A. That is right.

Q. And I refer you to the page that is marked as page No. 4 in the exhibit. Would you state what is contained on that page, not the contents, but just— A. No. 4.

Reino Haghanen, for Government—Direct.

Q. No. Is No. 4 the message that you were using for demonstration purposes? A. Yes, sir, that is right.

Q. Then the other pages, do the other pages then accurately describe the application of the code in enciphering that message? A. That is right.

Mr. Maroney: I would like first, before offering the exhibit, your Honor, to ask one further preliminary question which I think is pertinent to the (346) exhibit.

By Mr. Maroney:

Q. You mentioned that you received the code in Moscow, prior to coming to the United States.

Now, after you came to the United States did you receive instructions concerning your code at a later time? A. Yes, I did.

(347) Q. And about when was that that you received those instructions? A. I received those instructions in the summer of 1956.

Q. Would you state what the instructions were, to the best of your recollection, with respect to your code? A. In those instructions that I got, a little bit more complicated code, there were some changes made.

Q. Some changes were made in your earlier code, is that right? A. That is right.

Q. And the exhibit that you have just looked at, Exhibit No. 35 for identification, is that a demonstration of the code which you received in Moscow or the code which, after it was changed by your instructions, in about 1956? A. I didn't check it, but I can tell you just by checking it.

(Mr. Maroney handed the exhibit to the witness.)

Q. I show you photostatic copy of it. A. This is that what I got with changes already.

Reino Haghanen, for Government—Direct.

Q. This is worked out on the basis of the new code?

A. Yes, this is the latest code.

Mr. Maroney: At this time I offer Exhibit No. (348) 35 for identification in evidence, your Honor.

Mr. Donovan: I would respectfully object, your Honor, simply on the ground, that as an exhibit that is incomprehensible.

The message that is supposed to be on page four which I thought would be something about a quick gray fox.

The Court: What?

Mr. Donovan: Which I thought would be a quick gray fox jumping—you know, in order to demonstrate.

I submit that it is incomprehensible.

The Court: Is that a good objection, because you don't understand a hypothetical message? Is that a good objection?

Mr. Donovan: I believe this is a meaningless exhibit, and hence irrelevant in its present form.

The Court: Its purpose is to be a rendition of the code, and for the purpose of indicating how the code was used. It contains a hypothetical message.

Mr. Maroney: And that is the sole purpose for which it is offered.

Mr. Donovan: Will you examine page four?

The Court: I will, if you want me to; but I don't expect to gain anything by it.

(349) Mr. Donovan: I would appreciate it.

I respectfully say that that is meaningless.

The Court: Are you objecting to it because it appears to be in other than in the English language?

Mr. Donovan: Your Honor, part of it seems to be in the English language; the rest of it, I wouldn't even know if it is in Sanskrit.

The Court: Perhaps the jury will understand what isn't clear to you and me.

Reino Hayhanen, for Government—Direct.

Objection overruled.

The Court: This purports to be an illustration of the way the code worked, is that it?

Mr. Maroney: That is correct, sir.

Q. Now, I show you what has been marked as Government's Exhibit No. 36 for identification and ask you if you can identify that?

Have you seen that before? A. Yes.

This is a message what I ciphered for F. B. I. agent just to show him how this code works.

Q. Is that in your own handwriting, except for the type-writing on the first page of the exhibit? A. That is correct.

Q. Is that another hypothetical message which you (350) prepared solely for demonstration purposes? A. Yes, this also.

Mr. Maroney: I, at this time, offer Exhibit No. 36 for identification in evidence, your Honor, for the sole purpose of demonstrating the working of the code of the witness.

Mr. Donovan: Same objection, and on the further ground that one having been put into evidence, that I object to this.

The Court: Does this differ in scope or purpose from the last exhibit?

Mr. Donovan: It is about as clear, your Honor.

Mr. Maroney: If your Honor please, this Exhibit—

The Court: Does this differ in scope or purpose from the other?

Mr. Maroney: No, sir, no difference as to scope or purpose.

The Court: Then the objection is that it is a duplication; is that it?

Mr. Donovan: Yes, your Honor.

Together with a repetition of my objection, the earlier one, on the ground that it is incomprehensible as an exhibit.

Reino Hayhanen, for Government—Direct.

The Court: Well, if it is incomprehensible, (351) will it do any harm?

Mr. Donovan: I believe it would, your Honor. It would be highly prejudicial.

The Court: I am wondering why you have to duplicate it, but I think you know more about your case than I do.

Mr. Maroney: I think, your Honor, at least as far as I am concerned, the two phases, the two steps in the working of the code are more clearly demonstrated in this message than in the earlier one.

For that purpose, I think the Government is entitled to the full benefit of the available evidence.

The Court: Well, the witness has testified that this is the code that he used in promotion of the object of the conspiracy.

That is his testimony.

Now, if that is incomprehensible, it is incomprehensible, and that is all; but that isn't a good legal objection.

Mr. Donovan: Well, I object again, your Honor, to the introduction of this second exhibit on the ground, one, on the same scope and purpose that has been introduced.

(352) The Court: I think that is scarcely a legal objection.

The objection is overruled.

The Clerk: Exhibit No. 36 in evidence.

(Received and marked Government's Exhibit No. 36 in evidence.)

By Mr. Maroney:

Q. Now, I am going to show you what has been marked as Government's Exhibit No. 37 for identification.

The Court: 37 has been received in evidence.

Reino Häyhanen, for Government—Direct.

Mr. Maroney: I believe the last exhibit was 36.
I may have misspoke the number.

I think the present exhibit now marked is Exhibit
No. 37 for identification.

The Court: What is your question, please?

By Mr. Maroney:

Q. I am showing you Government's Exhibit No. 37 for
identification—

The Court: Hasn't that been received in evidence?

The Clerk: No. The last was 36.

The Court: Oh, yes, he made an objection and I
overruled it.

(353) The Clerk: All right.

The Court: 37 has been received in evidence.

The Clerk: No. 36 was just received.

The Court: Mr. Donovan said that 37 was merely
a repetition of 36.

Mr. Maroney: I think 35 and 36 are the only code
charts.

The Clerk: He is showing him a new one, which
is 37, your Honor.

The Court: All right.

By Mr. Maroney:

Q. My question, is whether you have previously exam-
ined the charts which make up Government's Exhibit No.
37 for identification? A. Yes, I did.

Q. And do these charts accurately demonstrate the appli-
cation of your code as it existed in 1952 and 1953 to what
purports to be a code message which makes up the first page
of the exhibit?

Mr. Donovan: Could I ask that the question be
read, your Honor?

The Court: Will you read the question, please?

Reino Hayhanen, for Government—Direct.

(The court reporter thereupon read the last question.)

(354) Mr. Donovan: I have no objection to his answering it.

The Court: Is the answer yes?

The Witness: Yes.

By Mr. Maroney:

Q. Now, calling your attention to the first page of the exhibit, 37 for identification, I desire to have you examine this as a hypothetical code message, and as I understand your testimony that the hypothetical code message can be deciphered by your code in accordance with the charts which are attached to that first page. Is that correct? A. It is.

Mr. Maroney: Your Honor, at this time, and for further purpose of identification, the Government offers 37 for identification in evidence.

Mr. Donovan: No objection, your Honor.

Could I have copies of the two earlier exhibits?

[The witness then gave a detailed explanation of how his individual code worked, deciphering a hypothetical coded message as illustration; he concluded his direct testimony, in reply to a question whether the defendant had a code similar to his, as follows:]

(386) A. Mark told me that he had the code but he was using—he was ciphering and deciphering different way; that he was using special small books with numbers what makes ciphering easier than by this method.

Reino Hayhanen, for Government—Cross.

(410) *Cross examination by Mr. Donovan:*

Q. Mr. Hayhanen, did you testify before the Grand Jury with respect to this case? A. Yes, I did.

Mr. Donovan: Your Honor, we respectfully move that the Court examine the Grand Jury minutes to determine either whether there is any inconsistent statement on the part of this witness or any statement which might exculpate the defendant.

(411) The Court: May I do that at a later time? You are not suggesting that I do it at this moment, are you?

Mr. Donovan: I am not, your Honor.

Do I understand the motion is granted, your Honor?

The Court: Oh, I shall examine the minutes.

By Mr. Donovan:

Q. Mr. Hayhanen, to your knowledge have you ever been indicted in the United States? A. I couldn't understand your question.

Mr. Tompkins: If your Honor please, if counsel can show any conviction I have no objection, but the indictment—

The Court: I do not understand that the question is competent as to an indictment. You know, any person is presumed to be innocent.

Mr. Donovan: Your Honor, he has been named in this indictment as a co-conspirator. He has been testifying for three days that he has committed a wide variety of offenses against the United States.

Mr. Tompkins: If your Honor please, I think that is highly prejudicial.

Mr. Donovan: It has the additional advantage of being true, your Honor. (412)

Mr. Tompkins: As to his being named as a co-conspirator, I concede that.

Reino Hayhanen, for Government—Cross.

The Court: I am unanimously against interruptions. Let Mr. Donovan finish, please.

Mr. Donovan: I submit, your Honor, that it is very relevant and competent to ask this witness whether or not he has, up to this time, either been indicted with respect to any of these matters, or has been accused by any Federal officials of having committed these crimes.

The Court: I didn't understand that to be your question.

Mr. Donovan: That is the sole question that I had, your Honor.

The Court: If your question is: Have you been indicted with respect to any matters concerning which you have testified in this trial, I will allow the question..

By Mr. Donovan:

Q. With respect to these matters concerning which you have testified in this trial, to your knowledge, Mr. Hayhanen, have you ever been indicted in the United States? A. I cannot understand the word "indicted."

(413) Q. Have you been formally charged with any crime with respect to these matters concerning which you have been testifying? A. For my best knowledge, no.

Q. Now, prior to May 6, 1957, did you ever have any conversation with any American officials, police or otherwise, concerning your activities in the United States or Russia? A. No.

Mr. Donovan: Will you mark this Exhibit A?

(Document consisting of thirty-seven pages, was marked Defendant's Exhibit A, for identification.)

By Mr. Donovan:

Q. Mr. Hayhanen, I show you Defendant's Exhibit A—

Reino Hayhanen, for Government—Cross

The Court: For identification.

Mr. Donovan: For identification, your Honor.

By Mr. Donovan:

Q. (Continuing) —consisting of some thirty-seven pages, and I ask you whether or not that is in your handwriting?

(Counsel hands document to witness.)

A. (Witness examines document.) Yes, it is.

(414) Q. When did you write it, to the best of your recollection? A. To the best of my recollection, I wrote this in May and June, 1957.

Q. Do you mean by that that you did not write it at one time? A. No. I didn't write in the same day because F. B. I. agents been questioning me, and when I had time, I was writing this letter.

Q. Could you fix the date more specifically?

The Court: Does it bear a date, by any chance?

Mr. Donovan: No, your Honor.

The Witness: There is no date.

I started it in 20th of May, and I believe I finished it in the beginning of June, 1957.

By Mr. Donovan:

Q. Now, where did you write this? A. I wrote this in hotel room.

Q. Where? A. In New York City.

Mr. Donovan: Mark this for identification, please.

(Document was marked Defendant's Exhibit B for identification.)

(415) By Mr. Donovan:

Q. At whose request did you write this statement? A. F. B. I. agents asked me to write what I know about my life, so I did.

Reino Haghamen, for Government—Cross.

Q. Now, I show you Defendant's Exhibit B marked for identification, which purports to be a translation of certain paragraphs of that statement by you on page 20, and I ask that you read it and tell the Court whether you agree that it is an accurate translation of those paragraphs?

(Counsel hands document to witness.)

The Court: Mr. Donovan, does that mean that a portion of Exhibit A for identification is in the Russian language?

Mr. Donovan: It is entirely in Russian, your Honor.

The Court: It is entirely in Russian?

Mr. Donovan: Yes, your Honor.

The Court: And your question now is as to these specific passages?

Mr. Donovan: Yes, your Honor.

(416) **The Court:** And you are asking if the translation is correct, in the opinion of the witness?

Mr. Donovan: Reasonably accurate, yes; your Honor.

(Witness compares Exhibits A and B, for identification.)

The Court: Have you any objection to stating by whom the purported translation was provided, if you know?

Mr. Donovan: I believe it is unnecessary, your Honor.

The Court: Well, it might help the witness, that's all.

Mr. Donovan: Your Honor, presumably he knows Russian.

The Court: Yes, but he has got to compare the Russian version with the English translation, and it might help him if you would tell him where the translation comes from, that's all.

Reino Hayhanen, for Government—Cross.

Mr. Donovan: I believe he has completed reading—

The Witness: Yes, I do.

By Mr. Donovan:

Q. Can you answer the question?

(417) Mr. Tompkins: I beg your pardon. Will counsel tell the witness? I can't see any objection to telling the witness who translated this document or whose purported translation this is, your Honor.

Mr. Donovan: Your Honor, I believe the witness is ready to answer my question.

The Court: Mr. Donovan doesn't want to do it, so let's yield to his reluctance.

Mr. Tompkins: All right.

Mr. Donovan: I can assure you that I didn't do it.

The Witness: I don't know who translated it but it is not right translation from what I was written over here (indicating).

By Mr. Donovan:

Q. It is not? A. No, it is not.

Q. Would you please correct the translation? A. Well, what I mean by PGU in this translation is GPU. That is two different things.

Q. Would you please correct the translation?

(Counsel hands pencil to witness.)

A. (Witness writes on Exhibit B, for identification.)

I cannot correct fully because it is not fully translated what I was writing, because I mentioned where that building was. (418)

In this translation there is no mentioning about the building.

Reino Hayhanen, for Government—Cross.

Q. Well, in so far as this is a translation of words which you wrote in Russian, is it accurate? A. No, it is not.

Q. Please correct the translation. A. I corrected as much as I could.

But then——

Q. May I have— A. —I have to add something else to it.

Q. You mean that there are other details in that statement which are not included in this paragraph? A. That's right.

Q. However, in so far as these paragraphs are concerned, they are, you believe, accurate translations now, is that right? A. They are accurate so far that what several words are not translated but to others, then, they are translated more accurate.

Q. Are any of these inaccuracies material, in your judgment?

Mr. Tompkins: Now, if your Honor please——

(419) The Court: Oh, I will sustain that.

Let the record show Mr. Donovan's pencil was returned by the witness to Mr. Donovan.

Mr. Donovan: May I please have the translation?

(Witness hands document to counsel.)

Mr. Donovan: We offer this in evidence, your Honor.

The Clerk: Any objection to this, Mr.——

Mr. Tompkins: I am comparing something here.

(420) Mr. Tompkins: Now, if your Honor please, the Government objects to the introduction into evidence of this document, for this purported translation, it hasn't been identified as to who translated it, number one; and, number two, the witness has testified that there are inaccuracies in it.

The Court: There is a third difficulty that confronts the Court, Mr. Donovan; it is an old-fashioned

Reino Haghanen, for Government—Cross.

rule of evidence that the contents of a written document not in evidence are not to be received.

Now, this purports to be a translation of a part of Exhibit A for identification, which is not in evidence.

Mr. Donovan: That is correct.

The Court: Now, on what theory are you entitled to introduce this translation?

Mr. Donovan: Your Honor, at four o'clock yesterday afternoon in response to your Honor's order that we be given copies of this man's statements, I was given these various documents in Russian.

Now, I have done the best that I can to have these particular parts of the man's own statement translated.

(421) If the Government believes that the translation is inaccurate, I ask that I be furnished with a copy of that particular page of the man's own statement in the English language.

I think that that is a reasonable request.

The Court: But what do you say about the proposition that the contents of a paper not in evidence be received in evidence, isn't it necessary that you should offer Exhibit A in evidence, in order to get a translation of it in evidence?

Mr. Donovan: I do not believe so, your Honor.

Mr. Tompkins: Your Honor, may I ask counsel this, please? Perhaps we can settle it. Is it Mr. Donovan's desire to use this translation for the purpose of cross examination?

Mr. Donovan: That is correct.

Mr. Tompkins: We will be happy to give him this document, which is a translation.

The Court: That is what you believe to be a correct translation?

Mr. Tompkins: We believe to be a translation. If that is his purpose.

Reino Hayhanen, for Government—Cross.

Mr. Donovan: Too bad I didn't get it at (422) four o'clock yesterday.

Mr. Tompkins: I also would like to correct the record, this was turned over at noon.

The Court: I thought it was turned over at noon.

Mr. Donovan: I said, to me, your Honor.

Mr. Tompkins: Well, if Mr. Donovan went back to his law office, we can't help that.

Mr. Donovan: Your Honor, the Government has given me a paper in the English language purporting to be a statement by this witness and—

The Court: That is—I am sorry to interrupt you—does this purport to be a complete translation of Exhibit A for identification?

Mr. Tompkins: That is our translation. We had it translated, your Honor, yes.

Mr. Donovan: And if it please the Court, I would like to offer in evidence, page 11 of that translation.

Any objection?

Mr. Tompkins: No objection.

The Court: Well, could we substitute for the paper shown the witness, this page 11, and call it Defendant's Exhibit B?

(423) Mr. Donovan: Yes, your Honor, there is no substantial difference between the two.

Mr. Tompkins: Can we substitute a copy of it?

Mr. Donovan: Yes.

Now, I suppose, for the record, that we ought to have an assurance from Mr. Tompkins that the paper he has handed to you he believes to be a correct translation of the witness' statement.

Mr. Tompkins: I just have faith in the people that translated it.

The Court: But you believe it to be?

Mr. Tompkins: I believe it to be, yes.

The Court: Mark this B instead of the previous B for identification.

Reino Hayhanen, for Government—Cross.

Now, you are offering only page 11 of Exhibit A for identification; is that correct?

Mr. Donovan: I am offering it in evidence, your Honor.

The Court: Yes, but you are offering page 11 of Exhibit A for identification?

Mr. Donovan: That is correct, Exhibit B in evidence.

The Court: That is received as Defendant's (424) Exhibit B, there being no objection.

(Page 11 of witness' statement was marked Defendant's Exhibit B in evidence.)

By Mr. Donovan:

Q. Now, Exhibit C of the defense, Mr. Hayhanen—

The Court: For identification.

Q. —for identification, consists of copies from the passport file of Eugene Nicoli Maki, consisting of the following:

1. The application upon which passport 256820 was issued December 4, 1956.

2. Report from the Consulate of the United States of America at Helsinki, Finland, regarding the passports issued for the month of July, 1952.

3. —

The Court: July, 1952?

Mr. Donovan: Yes, your Honor.

Q. (Continuing)— 3. Opinion of officer dated July 3, 1951.

4. —

The Court: By officer, whom do you mean?

Mr. Donovan: Your Honor, I am reading verbatim from the statement.

Reino Hayhanen, for Government—Cross.

The Court: Is there any way that we can tell (425) what he is an officer of?

Mr. Donovan: Yes, your Honor.

It is a statement, your Honor, by E. Paul Taylor, vice-consul of the United States of America, dated July 3, 1951.

The Court: At Helsinki?

Mr. Donovan. At Helsinki, Finland.

By Mr. Donovan:

Q. Item four, affidavit to explain protracted foreign residence, dated July 3, 1951, and signed, Eugene Nicoli Maki.

5. —

The Court: Now, just for a moment, it may help the jury if we agree that that is an affidavit purporting to show why a citizen of the United States was absent from the United States for a protracted period of time.

Mr. Donovan: For any period of two years or more, your Honor.

The Court: Yes.

We agree that that is the purpose of the affidavit?

Mr. Donovan: That is correct.

The Court: And that would be on the theory that (426) Maki was an American citizen who was absent from the United States?

Mr. Donovan: That is correct. It would be on his sworn statement that he was an American citizen.

The Court: Yes.

By Mr. Donovan:

Q. Item No. 5, application for a passport dated July 3, 1951, in the name of Eugene Nicoli Maki.

Reino Hayhanen, for Government—Cross.

This exhibit, Mr. Hayhanen, bears an attestation in the name of Christian A. Herter, acting Secretary of State.

I show it to you and ask you whether in the various places in these documents where the signature Eugene Nicoli Maki appears, is it in your handwriting, and did you sign those documents?

The Court: Are these original documents, Mr. Donovan?

Mr. Donovan: Your Honor, these are what we obtained in response to our request.

The Court: Maybe Mr. Tompkins can tell us, are these originals or certified copies?

Mr. Tompkins: Certified copies, your Honor.

The Court: Isn't the witness entitled to know that you are showing what purports to be a certified (427) fied copy?

Mr. Donovan: I explained to him that it bears an attestation by the Secretary of State that these are accurate copies.

The Court: Yes, but I think your question is, did you sign the original copy of which this purports to be a copy?

Mr. Donovan: That is correct, your Honor.

The Witness: Like I see by those copies, I signed original of them.

Mr. Donovan: I offer it in evidence, your Honor.

Mr. Tompkins: No objection, your Honor.

The Clerk: Exhibit C.

(Affidavit marked Defendant's Exhibit C in evidence.)

By Mr. Donovan:

Q. Mr. Hayhanen, I show you Defendant's Exhibit D for identification, and which purports to be an original agreement signed between Tri-Berg, Incorporated, a cor-

Reino Hayhanen, for Government—Cross.

poration of New Jersey, as landlord, and Eugene Maki and Hanna Maki, of 24 Rogers Avenue, Brooklyn, New York, and signed by Sam Spiller, president of Tri-Berg, Incorporated, and signed Eugene Maki—Eugene N. (428) Maki and Hanna Maki.

I ask you whether or not you recognize this agreement?

The Court: Has it a date? Did you give us the date?

(429) Mr. Donovan: I thought I did, your Honor. Is there a date at the end there?

The Witness: Yes, I do.

Q. And is—did you sign that agreement? A. Yes, I did.

Q. And did your wife sign it? A. Yes, she did.

The Court: May we have the date, just for the record?

Mr. Donovan: Your Honor, the agreement was signed on March 29, 1955, and relates to a tenancy of the store known as 806 Bergen Street, Newark, New Jersey, together with four rooms in the rear thereof for a term of three years to commence April 1, 1955, and to end on March 31, 1958.

The Court: Are you offering it?

Mr. Donovan: I now offer it in evidence, your Honor.

Mr. Tompkins: No objection, your Honor.

Mr. Donovan: If it please the Court, if there is no objection by the Government, I would like to substitute a photostatic copy of the original which I have promised to return.

Mr. Tompkins: No objection, your Honor.

(430) The Clerk: Exhibit D in evidence.

(Agreement marked Defendant's Exhibit D in evidence.)

Reino Hayhanen, for Government—Cross.

By Mr. Donovan:

Q. I believe, Mr. Hayhanen, that you have testified that in February, 1953 your wife joined you in the United States, is that correct? A. That is right.

Q. And I believe that you have testified that you were married in 1951? A. That is right.

Q. Isn't it a fact, Mr. Hayhanen, that at the time you say that you married in 1951 you already had a wife and child? A. It is.

Q. That is true? A. Yes.

Q. And I read to you from Defendant's Exhibit B now in evidence, the following, which purports to be your own statement to the F. B. I.:

"During the summer of 1948 I was called to Moscow through the "Condres" section of P G U, first main administration M G B, USSR. There it was explained to me that the "Condres" section of M G B (431) is selecting workers possessing knowledge of Finnish language for intelligence work assignment, possibly to Finland.

"Therefore I was called to Moscow for personal interview with some fellow workers and superiors of P G U. I was in Moscow during several days. There in the P G U building located on "Shushinski" Square house No. 2, Barishnikov, a former chief of the operative section who held the rank of major general in 1948 and was the chief of P G U section interviewed me"—

The Court: Will you stop long enough to spell that name?

The last one that you mentioned.

Mr. Donovan: B-A-R-I-S-H-N-I-K-O-V.

By Mr. Donovan:

Q. "After I gave formal consent to do intelligence work with a condition that I can leave with my wife and

Reino Hayhanen, for Government—Cross.

son." Is that correct? A. Yes, it is, and correct translation too.

Q. So as I understand your testimony, you are testifying that you have been a bigamist?

Mr. Tompkins: Now, if your Honor please, I (432) think his testimony speaks for itself.

The Court: I don't think he needs to characterize the legal effect of his testimony.

Mr. Tompkins: Mr. Donovan is quoting from a document concerning the year 1948.

The Court: Yes.

The Witness: I was married 1951.

Mr. Donovan: He has already testified that in 1951—

The Court: I have sustained the objection, Mr. Donovan.

By Mr. Donovan:

Q. Is it legal in Russia to have two wives at once?

Mr. Tompkins: I object to that.

Mr. Donovan: I think he knows, your Honor.

The Court: Maybe he knows, but perhaps the jury doesn't care.

I will sustain the objection.

Mr. Donovan: I think the jury would be very interested.

Mr. Tompkins: Well, now—

The Court: Perhaps I misapprehended their attitude.

I may be wrong.

(433) By Mr. Donovan:

Q. And referring, Mr. Hayhanen, to Defendant's Exhibit C, consisting of these certified copies of passport documents, is it not a fact that in this passport application upon which your passport was issued December 4, 1956,

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and signed by you, that in response to the question, present full legal name of spouse, you wrote, Hanna Maki and stated as to the date of your marriage that you were last married on November 25, 1951? A. That is right.

(434) Q. And yet you admit that on November 25, 1951 you had a wife and son in Russia; is that right? A. It was part of my legend because—that is why I wrote—answered this way questions.

Q. I asked you a simple question. On November 25, 1951 is it not a fact you had a wife and son in Russia? A. It is.

Q. To the best of your knowledge, do you still have a wife and son in Russia? A. I don't know.

Q. Now, with respect to your testimony that in 1953 you were joined here by a woman, who is the woman who joined you?

Mr. Tompkins: If your Honor please, I think his testimony was that in 1953 he was joined by his wife.

The Court: That is what I understood.

Mr. Donovan: Your Honor, the man is testifying—

The Court: I heard the testimony. I guess most of the people in the room have heard it.

Now, the correct question is: Who joined you in the United States in 1953, if you want to go into it.

(435) Mr. Donovan: Your Honor, I did, and all that I asked is who the woman was.

Mr. Tompkins: Well, I object to that.

The Court: Will you please ask who it was that joined—

By Mr. Donovan:

Q. Who joined you in February, 1951?

The Court: 1953, I think.

Mr. Donovan: 1953.

The Witness: My wife by church marriage.

Reino Hayhanen, for Government—Cross.

By Mr. Donovan:

Q. What is her name? A. Hanna Maki.

Q. And is this the Mrs. Maki who signed the lease with you on the Bergen Street premises? A. Yes, she is.

Q. Now your testimony, as I understand it, Mr. Hayhanen, is that you leased these premises in Bergen Street to serve as a cover for espionage work.

Is that correct? A. It is.

Q. Now, with respect to 806 Bergen Street, Newark, is it not a fact that that is a predominant colored neighborhood?

(436). Mr. Tompkins: Now——

The Witness: No, it is not.

Mr. Tompkins: If your Honor please——

The Court: He says no.

The Witness: At least when we moved out, and it was 1956. May of 1956 or June.

By Mr. Donovan:

Q. You say you leased these premises to set up an espionage cover under the guise of a photography shop; is that correct? A. It is.

The Court: By photography shop, do you mean a shop for the sale of supplies—photographic supplies—or do you mean a studio where photographs were taken?

I think that ought to be clarified.

By Mr. Donovan:

Q. Would you answer his Honor's question? A. Yes. As I was planning to open both a studio and the same—at the same time to sell some photo equipment as film, photo paper, or some cameras.

Q. And this was supposed to be your cover? A. That's right.

Reino Hayhanen, for Government—Cross.

Q. Did you ever open up any such shop— (437) A. No.

Q. At those premises? A. I did not.

Q. Is it a fact you boarded up the front windows so as to completely close out any light? A. I didn't board it.

Q. What did you do with respect to the front windows? A. I put glass wax on front windows because they have been dirty and I left that glass wax on those windows up to opening of that business.

And because I didn't open, I didn't wash those—that glass wax off.

Q. Could the ordinary person see from the outside through the glass wax? A. Yes, because it was not so thick and many people been looking through that glass wax.

Q. How long were you there? A. About one year.

Q. About one year? A. Yes.

Q. During that time, when you had this espionage cover, you had this photographic shop that never opened and that had glass wax covering the front windows, is that (438) right? A. That's right.

Q. Now, I want you to think very carefully, Mr. Hayhanen. While you were living at that address with wife No. 2—

Mr. Tompkins: Oh, now, if your Honor please, I don't think that is fair, to characterize.

The Court: I suppose that numerically he is correct, isn't he?

By Mr. Donovan:

Q. Now, I want you to think very carefully—search your recollection on this.

While you were living there was an ambulance ever called to attend you? A. Yes.

Mr. Tompkins: Your Honor, I would like to—

Mr. Donovan: He has already answered yes.

Reino Hayhanen, for Government—Cross.

By Mr. Donovan:

Q. Did the police call that ambulance?

Mr. Tompkins: If he knows.

The Witness: No.

By Mr. Donovan:

Q. If you know. A. Not police.

(439) Q. Would you kindly explain how the ambulance was called? A. Landlord came to see us, and he called an ambulance.

Q. Why, if you know?

Mr. Tompkins: If your Honor please.

Just a minute.

I would like to know what the materiality of this questioning is, your Honor.

Mr. Donovan: The materiality, your Honor, is this, if you need any—

The Court: You don't have to make a speech every time Mr. Tompkins says he would like to know something.

We would all like to know.

We will make progress if you continue with your questioning.

By Mr. Donovan:

Q. If you know, what was the reason why the ambulance arrived? A. Yes, I know.

Q. Well, tell us. A. We been packing everything what was ours to move out from that storage; and when I was cutting rope from one package my hand with knife just went around and I cut my (440) leg.

Q. How severe was this wound? A. It was maybe one and a half inch.

Q. Isn't it a fact that the reason the landlord called the

Reino Haglanen, for Government—Cross.

ambulance was that blood was all over the premises? A. Yes. Not all over, but in couple rooms.

Q. Yes, and isn't it a fact that, I ask you, wife No. 2 had stabbed you in a drunken brawl? Isn't that true? A. No, it is not. I can answer more if you like about that whole situation.

Q. If you deny that she stabbed you, there is not anything more I can do at this time. A. She didn't not. She did not.

(441) Q. Isn't it true that the police on various occasions visited your premises? A. On various occasions, no.

Q. On several? A. Just only one.

Q. Would you explain the circumstances? A. Like I explained already, that when they called an ambulance, with ambulance came some police.

Q. I am not referring to that occasion.

I am asking you whether or not the Newark police came to your premises at any other time, to your knowledge, while you were living there? A. They never been in our premises when we been living over there.

Q. Did they try to get in one night? A. I don't know but—

Q. While you were there? A. One night when I was over there?

Q. Yes. A. I believe that nobody tried to, otherwise I would open the door, and ask who is over there, if I was inside.

Q. Isn't it true— Isn't it true that on any of these occasions—isn't it true that you had been beating your wife? (442) A. No, it is not.

The Court: Just a minute. You will have to reframe your question. I don't know what you mean by "any of these occasions."

He told you the police were there once to his knowledge. So, please change the form of the question.

Were the police there more than once?

Reino Hayhanen, for Government—Cross.

The Witness: No. Just only once with that ambulance, like I explained.

By Mr. Donovan:

Q. Do you remember the bakery store next to 806 Bergen Street? A. Yes, I remember.

Q. Is it not true that one day you entered that store with your wife, bought a loaf of bread, and threw it on the floor and ordered the woman to pick it up?

Is that true or false?

Mr. Tompkins: I don't see what the materiality—

The Witness: When?

Mr. Tompkins: —of throwing a loaf of bread on the floor is in an espionage case.

Mr. Donovan: Your Honor, he has answered, I believe.

(443) The Witness: No. I asked you a question, when it was.

I cannot recall that kind of thing right now.

By Mr. Donovan:

Q. You mean this is an ordinary incident and you just wouldn't recall it? A. No, it isn't ordinary, but because it is extraordinary, that way, that I believe that it didn't happen.

Maybe you can recall to me that when it happened.

Q. Do you deny that this ever happened? A. I just asked, will you please tell me when it happened?

Q. If you can't even recall such an incident— A. No. Maybe I will recall at that time I was even in different city. That is what I would like to know.

Q. At the time you lived in Bergen Street, did you drink? A. Yes, I was drinking.

Q. How much? A. In different days, different weeks, different way.

Reino Hayhanen, for Government—Cross.

Q. What is the most you ever drank in one night while you were living at that address? A. About one pint.

Q. A pint? A. Yes.

(444) The Court: Of what?

The Witness: A pint of vodka.

The Court: Vodka.

By Mr. Donovan:

Q. Isn't it a fact that while you were living there, in Bergen Street, that you used to put out in the trash large quantities of liquor bottles? Isn't that true?

Mr. Tompkins: What—I would like to know what Mr. Donovan calls large quantities of liquor bottles.

Mr. Donovan: A pint of vodka would be good enough for me, but I am just asking this question, your Honor.

The Court: Well, I think—

Mr. Tompkins: What is a large quantity to Mr. Donovan? A pint?

The Court: I think that the witness is entitled to a rather definite suggestion.

By Mr. Donovan:

Q. Wouldn't it—

The Court: A large quantity of bottles over a long period of time would be one thing; a large quantity of bottles over a day or two would be another.

Now, he is entitled to know what you are asking (445) him about.

By Mr. Donovan:

Q. Didn't you at least once a week put out into your trash four or five whisky bottles or other liquor bottles?

A. Sometimes I put them once a week. Sometimes I put them once in three weeks.

Reino Hayhaugen, for Government—Cross.

Because there are four rooms and big store room there, is enough hiding place where I could put those empty bottles.

Q. All this time, as we understand your testimony, while you are living there with the windows covered with Glass Wax and throwing out these liquor bottles and having—

The Court: There is no testimony about windows being covered or his throwing out anything.

If you are quoting him, please do it accurately.

He said the windows were lined. That is number one.

He has not testified that he threw out a large number of liquor bottles. That is number two.

Now, please start over again and be accurate.

By Mr. Donovan:

(446) Q. And with an ambulance being called, attended by the police because of this wound on your leg, at this time we are to believe that you are a Lieutenant-Colonel in the Soviet Secret Intelligence and that you were there to conduct an espionage cover operation; is that right?

Mr. Tonipkins: Wait just a minute.

Is there any proof that the ambulance was attended by a policeman?

Mr. Donovan: Yes. I believe that he has so stated.

The Court: I don't think he says the ambulance was attended by the police. I think he said the police were sent with the ambulance.

Mr. Donovan: No, your Honor. The landlord sent for the ambulance.

The Court: The landlord sent for it.

Mr. Donovan: And because of the nature of the injury, a policeman was present.

By Mr. Donovan:

Q. Isn't that true?

Reino Hayhanen, for Government—Cross.

Mr. Tompkins: Wait just a minute.

Secondly, I think the question is argumentative.

The Court: It certainly is argumentative and (447) recitative.

If he answered a plain question: What was your position in the year 1953? That would save time and trouble.

Do you wish to ask that?

Mr. Donovan: No, your Honor.

(448) By Mr. Donovan:

Q. Now, returning to the subject of drink, Mr. Hayhanen, do you still drink? A. Yes.

Q. How much did you drink yesterday? A. The whole day?

Q. The whole day and the evening. A. About four drinks as they serve in bars.

Q. Have you had anything to drink this morning? A. I drink this morning coffee and had my breakfast.

Q. Any alcohol this morning? A. No.

Mr. Tompkins: I still, your Honor, don't see the materiality of this line of questioning in a conspiracy to commit espionage.

The Court: It may go to the credibility of the witness.

By Mr. Donovan:

Q. Now, returning to Defendant's Exhibit A, Mr. Hayhanen, which is this 37-page handwritten statement—

The Court: Have you offered that in evidence?

Mr. Donovan: No, your Honor. I have only put in parts of it.

The Court: That is what I thought, so don't (449) refer to it as Defense Exhibit A because it isn't in evidence.

Mr. Donovan: A for identification, your Honor.

Reino Hayhanen, for Government—Cross.

By Mr. Donovan:

Q. I call your attention to the Government's translation of this statement on page 13 and I ask you—

The Court: I am sorry. I do not mean to interfere but I would like to get this straight.

Defense: Exhibit B is page 11 of Exhibit A for identification, is that correct?

Mr. Donovan: Of Exhibit A for identification, your Honor.

The Court: Yes, Exhibit A for identification.

Now you are showing him page 13.

Mr. Donovan: Of Defense Exhibit A for identification.

The Court: Have we to go through the same process about translation?

Mr. Donovan: No, your Honor. I am using the Government's translation.

By Mr. Donovan:

Q. Did you answer? A. I didn't.

Q. Oh, I am sorry.

(450) (Counsel hands document to witness.)

I asked you if that is an accurate translation of your own statement. A. (Witness examines document.) Just this I resided (indicating).

Q. Just that? A. It is.

Mr. Donovan: I offer it in evidence, your Honor. This is page 13 of Defense Exhibit A for identification.

The Court: You say you are offering it?

Mr. Donovan: In evidence, your Honor.

Reino Hayhanen, for Government—Cross.

The Court: Are you offering it as part of Exhibit B or as a separate exhibit?

Mr. Donovan: A separate exhibit, your Honor.

The Court: That is Exhibit E, I think, isn't it, Mr. Scott?

The Clerk: Yes, sir.

Mr. Tompkins: No objection, your Honor.

(Translation of page 13 of Defendant's Exhibit A for identification was marked Defendant's Exhibit E and received in evidence.)

By Mr. Donovan:

Q. Now—

(451) Mr. Donovan: Now, referring to this Exhibit, your Honor, which he has stated—

The Court: Yes. I heard what he said. Go ahead. Ask him a question.

Mr. Donovan: I do not intend to ask him a question, your Honor, but I do want to read this exhibit to the jury.

And this reads as follows:

"I resided and worked inland from July, 1949 to October of 1952.

"There I received my American passport and arrived to New York in October of 1952.

"I did not engage in espionage activity and did not receive any espionage or secret information from anyone during my stay abroad, neither in Finland nor in the United States of America." No further questions, your Honor.

The Court: Cross examination closed?

Mr. Donovan: It is, your Honor.

Mr. Tompkins: Just a couple of questions, your Honor.

*Reino Hayhanen, for Government—Re-direct.**Re-direct examination by Mr. Tompkins:*

Q. Mr. Hayhanen, what were you sent to the United (452) States for?

Mr. Donovan: Objection.

Mr. Tompkins: Now, counsel just read a statement to the jury. I feel it is proper re-direct, your Honor.

Mr. Donovan: Your Honor, I respectfully ask that any re-direct be carefully confined to the scope of my cross examination.

This was brought out purely, your Honor, for purposes of impeaching the witness.

The Court: Was it part of your cross examination?

Mr. Donovan: Was what, your Honor?

The Court: The last passage you read, was that in connection with your cross examination?

Mr. Donovan: It is an exhibit in the case.

The Court: Was it part of your cross examination?

Mr. Donovan: It was.

The Court: Do you withdraw the objection?

Mr. Donovan: With, however, your Honor—I believe—

The Court: The answer is yes, isn't it?

Mr. Donovan: It is your Honor. But I believe I am entitled to an instruction that they do (453) not go beyond my cross examination.

The Court: Mr. Tompkins, I think, is an experienced trial lawyer. I doubt if he needs the instruction. Re-direct is necessarily confined to matters developed in cross.

Mr. Tompkins: May I have an answer to that question, please?

Reino Hayhanen, for Government—Re-direct.

Will you read it for the witness, please?

(Whereupon the last question was read.)

The Witness: I was sent to the United States as Mark's assistant for espionage work.

(455) The Court: Is this 38?

Mr. Maroney: 38, yes, your Honor.

The Court: No objection?

Mr. Fraiman: We have no objection, your Honor.

The Court: What is it, for the record?

Mr. Maroney: This is a certified copy of Immigration & Naturalization Service records relating to the entry and exit into the United States and from the United States of Mikhail Nikoliavich Svirin.

The Court: A co-conspirator?

Mr. Maroney: Yes, sir.

This form—

The Court: Why don't you complete the record by stating what it shows?

Mr. Maroney: It is certified to on October 8, 1957, by Sol Marks, Acting District Director of Immigration & Naturalization Service.

The Court: What does it show, please, about Svirin?

He came and left when?

Mr. Maroney: It shows that he entered the United States at the Port of New York on August 27, 1952, the manner of entry not known.

(456) And the certificate of admission of alien office requesting verification is blank.

File number—it gives a file number—and then it contains a notation "valid for single application for entry," and then, "Soviet Diplomatic Passport No. 02785, I. S. S.," with the date, "7/11/52."

And it also contains a notation:

Reino Hayhanen, for Government—Re-direct.

"Born 2-23-18.

"Departed at New York, New York, on 4-21-54, via **RMS Queen Elizabeth.**"

It also shows the citizenship of Mr. Svirin as being Soviet.

"Race: Russian.

"Place of birth: Moskovskaya, Oblast," and the rest of it—

The Court: I didn't mean to take an unfair advantage of you.

Mr. Maroney: It also gives the visa or permit number, the section 37; the last permanent residence: "Moskow, Kuznitsky."

The Court: Date of departure was?

Mr. Maroney: Date of departure was 4-21-54.

There is also the entry here:

(457) "Name and complete address of person to whom destined," and with the notation, "First Secretary of Soviet Representation in U. N.

"Purpose in coming and length of intended stay: Duration of existing status," is the notation under that, and then that gives a description.

The Court: That means a destination in the United States at the time of entry, is that it?

Mr. Maroney: That is right, sir. It was First Secretary of Soviet Representation in U. N.

And his purpose in coming and length of intended stay is noted in the form as "Duration of existing status."

There is also attached a second similar certificate relating to a different entry, this time on September 9, 1954, on the SS *Liberte* at the Port of New York.

The Court: That is September 9, 1954?

Mr. Maroney: That is correct, sir.

At New York.

And this contains similar information, including the fact of the Soviet Diplomatic Number 02785,

Arlene Brown, for Government—Direct.

"I. S. S."—that presumably means issued—(458)
"7-11-52."

And in the space for the name and complete address of person to whom destined, again, it contains the notation, "First Secretary to Soviet Mission of U. N., New York."

The Court: Now, is there any record of departure?

Mr. Maroney: There is no record of departure on this certificate.

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(459) ARLENE BROWN, witness called on behalf of the Government, being first duly sworn, testified as follows:

Mr. Donovan: Your Honor, I have some other work to do in connection with the defense; would it be satisfactory if Mr. Fraiman handles any objections of this witness?

The Court: Yes.

Direct examination by Mr. Tompkins:

Q. Where do you live? A. Radium, Colorado.

Q. Will you tell us where Radium, Colorado is? A. It is west of Denver.

Q. Is it near Salida? A. No, sir.

Q. Now, are you married? A. Yes, sir.

Q. Do you have any brothers and sisters? A. Two brothers and two sisters.

Q. Will you give us the names of your brothers, please? A. Sergeant Roy A. Rhodes, and Franklin S. Rhodes.

Q. When you say Roy A. Rhodes is a sergeant in (460) military force of the United States— A. Yes.

The Court: Name of the second brother, please?

The Witness: Franklin S. Rhodes.

Q. Do you know what branch of Service, Mrs. Brown?

A. He is with the Army.

Arlene Brown, for Government—Direct.

The Court: You are speaking now of Roy or Franklin?

The Witness: Roy.

Mr. Tompkins: Roy, your Honor.

Q. Do you know how long he has been in the Army, roughly? A. Well, he went in during World War II. During World War II.

Q. Do you know whether he is still in the Army? A. Yes.

Q. And his service has been continuous as far as you know? A. Yes, sir.

Q. Now, directing your attention, Mrs. Brown, to the spring of 1955, did you receive a telephone call concerning your brother Roy? A. Yes, sir.

Mr. Fraiman: Objection, your Honor.

(461) The Court: Why?

Mr. Fraiman: To any telephone conversation this witness received.

The Court: I hadn't heard anything about the conversation. She just said that she received a call.

By Mr. Tompkins:

Q. Now, was the person, Mrs. Brown, who called, a man or a woman? A. A man.

Q. Can you describe his voice, please? A. He had a very heavy accent.

Q. Did this man give his name to you? A. Yes, he did.

Mr. Fraiman: Objection to any of the content of the conversation.

The Court: I will allow the question and answer.

Mr. Tompkins: Will you give me the answer; I didn't hear it, please?

(The reporter thereupon read the last answer.)

Arlene Brown, for Government—Direct.

Q. Do you recall the name? A. No, sir.

Q. Can you tell us what he said?

Mr. Fraiman: I object, your Honor, as not binding (462) on the defendant.

Mr. Tompkins: Your Honor, I am simply offering this conversation not for the truth but for the fact of the conversation.

The Court: Ask her if she had a conversation with him.

Q. Did you have a conversation with him? A. Yes, sir.

Q. Will you tell us about the conversation?

Mr. Fraiman: I object, your Honor.

The Court: How is that binding on the defendant?

Mr. Tompkins: Well, your Honor, we will connect up this witness' testimony.

The Court: I thought you said that you were out to establish the fact of the conversation.

Now, you have established it.

The witness has said that she had a conversation with someone who called her on the telephone.

Mr. Tompkins: That is correct, your Honor, and I am only asking her to state the conversation to show the fact and not for the truth of the conversation, what transpired.

The Court: I don't see how it is admissible.

(463) Mr. Tompkins: All right. I will withdraw it.

By Mr. Tompkins:

Q. Mrs. Brown, what did you say to this individual, just what you said? A. Well—

Mr. Fraiman: I object, your Honor; the testimony was not made in the presence of the defendant, her statements are not binding on the defendant.

Edward F. Gamber, for Government—Direct.

The Court: If the conversation is not admissible, how does part of it become admissible?

Mr. Tompkins: No further questions.

Mr. Fraiman: I have no questions, your Honor.

(Witness excused.)

(464) EDWARD F. GAMBER, witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Maroney:

Q. Mr. Gamber, would you state your occupation, please? A. I am a Special Agent in the Federal Bureau of Investigation.

Q. How long have you been so employed? A. Six and a half years.

Q. Now, directing your attention to May 12 of this year, do you recall where you were on that date? A. In Peekskill, New York.

Q. And in the course of your official duties, did you on that date have occasion to search the premises of one, Reino Hayhanen? A. I did.

Q. Is that the same Reino Hayhanen who has previously testified in this case? A. It is.

Q. Did you know Mr. Hayhanen by any other name? A. I did. I knew him by the name of Eugene N. Maki.

Q. You say that you did have occasion to conduct a (465) search of his home? A. I did.

Q. And in connection with that search, were you in possession of a written consent to search and seize property found at the time of the search? A. Yes, we were.

Q. Were there any other Special Agents with you during the search? A. There were, Special Agent John T.

Edward F. Gamber, for Government—Direct.

Mullhern was present, George M. Massett, and they participated.

The Court: What is that last name?

The Witness: M-A-S-S-E-T-T. They participated in the search with me.

By Mr. Maroney:

Q. So that the three of you conducted the search of his home? A. That is right, special agents John G. Willis, Douglas P. White, Eugene Oja, and Special Employee, Kenneth E. Delanoi were also present.

Q. Now, was either Mr. or Mrs. Maki present during the conduct of the search? A. Mrs. Maki was present.

Q. Will you tell us the duration of the search on that day, May 12th? (466) A. The search commenced at approximately four-thirty P.M. and continued until approximately eleven-five P.M.

Q. Mr. Gamber, I show you what has been marked as Government's Exhibit 39 for identification, and ask if you have seen that box before? A. Yes, this box was located during the search in the store room in Eugene Maki's home.

Q. Now, was anyone with you at the time that you located and took possession of that particular box? A. Special Agent John T. Mullhern.

Q. The box bears a scotch tape, a piece of paper on the top, other than the label for the exhibit number; could you say when and where that paper and the writing was placed on the box? A. This paper was placed on the box by myself and Special Agent John Mullhern on October 7, 1957, to replace a paper which was placed on there on May 12, 1957, inasmuch as the paper that was on there had become torn and was in poor shape and we wanted to preserve it.

(467) Q. Did you take the box from Mr. Hayhanen's home? A. I did.

Edward F. Gamber, for Government—Direct.

Q. In the company of Mr. Mullhern? A. That is right.

Q. What did you and Mr. Mullhern then do with the box? A. We placed that box along with other evidence which we had seized in a bureau automobile and took it to our New York office, brought it up to the seventh floor of our New York office where it was placed in a corner and that is where I left it in the possession of special agent John T. Mullhern.

Q. All right.

Now, also on the occasion of this search did you have in your possession a diagram? A. We did have a diagram, yes.

Q. I show you what has been marked as Government's Exhibit 40 for identification and ask if you can identify that. A. This is a diagram which we used in searching Reino Hayhanen's home.

Q. Can you tell us from whom the F. B. I. had secured that diagram? A. This diagram was received from Reino Hayhanen.

(468) Q. Now—

The Court: From whom?

The Witness: Reino Hayhanen.

By Mr. Tompkins:

Q. Did you use that diagram in any way in conducting your search? A: Yes, we used this diagram in our search of the cellar of Reino Hayhanen's home.

Q. And in connection with your search of the cellar, and the use of the diagram, were you searching for any specific object? A. We were searching for a birth certificate which was buried in the cellar of the home, that is designated by an X on that diagram.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit 40 for

Edward F. Gamber, for Government—Direct.

identification, the piece of paper containing the ink diagram and exclusive of the other slips of paper in here containing initials and the F. B. I. laboratory slip.

Mr. Fraiman: Can we ascertain on what date this diagram was prepared?

The Court: He said he used it on May 12th. I don't know whether he said he prepared it that day (469) or——

Do you know when it was prepared?

The Witness: No, sir. I am not sure. I think it was prepared on May 12th, and I think it will be indicated on the paper, in the back there.

Mr. Fraiman: The back has a date of May 10th. I object to its admission on the ground that it is not binding on the defendant inasmuch as it was prepared by Hayhanen subsequent to the time he was cooperating with the Government.

I believe the paper on the back is indicative of the fact that he was cooperating with the Government at the time he prepared it.

The Court: Well, unless the diagram is offered as the product of Hayhanen's pen, I should suppose that it could be admitted in corroboration of the witness' testimony, that he used a diagram.

If it is offered—if its offer is confined in that way, perhaps the objection will be withdrawn.

Mr. Maroney: Very well, your Honor. We will make the offer for the purpose of showing that this is the diagram that was used on this occasion.

The Court: Without regard to its authorship?

Mr. Maroney: Correct.

(470) Mr. Fraiman: We have no objection, your Honor.

Edward F. Gamber, for Government—Direct.

Q. Will you explain to the Court and jury how you made use of that diagram in the conduct of your search?

A. That diagram contains an X between two marks which indicate the supporting pillars in the rear of the basement of Reino Hayhanen's home; by use of that diagram, located a spot directly between these two supporting posts and began to dig there to locate this birth certificate.

Q. Now, you say you did commence digging there?

A. That is right.

Q. And did you locate anything? A. Yes, a distance of fifty-three inches from the left supporting post, and forty-one inches from the right supporting post, we located a package buried approximately five inches in the sand.

Q. Was, to your knowledge, a photograph taken of the hole as it was dug out at the time that you made the search? A. A photograph was taken by special employee Kenneth Delanoi at my direction.

Q. And were you present? A. I was.

Q. I show you what has been marked as Government's Exhibit 41 for identification and ask if you can identify (471) that photograph. A. This is the photograph of the hole in which the birth certificate was uncovered. I shouldn't say birth certificate. I am sorry; in which the package wrapped in a Dugan's wrapper was located as well as the package itself, immediately after it was removed from this hole.

Q. I show you what has been marked as Government's Exhibit 42 for identification and ask if you can identify that. A. This is the wrapper which was—in which the package was wrapped which we located at that position in Reino Hayhanen's cellar.

Mr. Maroney: At this time, if your Honor please, I offer in evidence, Government's Exhibit 42 for identification.

Edward F. Gamber, for Government—Direct.

I want to clear-up a point raised by counsel, your Honor.

Q. This package contains a piece of note paper, containing some ink handwriting, Mr. Gamber, and with initials at the bottom, E. F. G. Are those your initials?

A. They are.

(472) Mr. Maroney: At this time, your Honor, I offer it exclusive of the handwritten note that was placed there by Mr. Gamber.

The Court: Let's get the record straight.

You are offering something in a cellophane envelope, aren't you?

Mr. Maroney: Yes, sir.

The Court: And as to the wrapper that is contained in the cellophane envelope, is it—

Mr. Maroney: The wrapper?

The Court: Yes, the wrapper concerning which he has testified.

Mr. Maroney: That is correct.

The Court: Now, is the paper which you have just described attached to that wrapper?

Mr. Maroney: It is not attached; it is just inside.

The Court: Well, you are not really offering that at all?

Mr. Maroney: Not at all.

The Court: You are only offering the wrapper as confined in the cellophane envelope—

Mr. Maroney: Also some pieces of paper that pertain to the search and we do offer that.

(473) The Court: Well, does the record show that?

Q. You have testified that this contains a bread wrapper, is that correct? A. That is right.

The Court: He didn't say bread, he mentioned the name; but we know what the name means.

Edward F. Gamber, for Government—Direct.

Q. There are some other pieces of paper in the cellophane package; were they, to your knowledge also found at the time of the search? A. They were not visible to me, but that package was sent to our laboratory and I believe the other papers were found in the wrapper.

Q. In other words, you received or you secured from the hole a bread wrapper in which something was wrapped, is that correct? A. That is right.

The Court: What is it you are offering?

Mr. Maroney: At this time we will offer the bread wrapper, contained in envelope marked Exhibit No. 42.

Mr. Fraiman: No objection, your Honor.

Mr. Maroney: We also offer at this time Government's Exhibit No. 41 for identification, which is the photograph.

(474) Mr. Fraiman: I object to the admission of the photograph which has been identified as Government's Exhibit No. 41 for identification on the ground that it is immaterial and not binding on the defendant.

The Court: All it tends to prove is that when the witness testified that he dug a hole at a certain place he had a picture taken of it.

Now, that is all that it tends to prove.

Mr. Fraiman: I know that, your Honor; as such I don't think it is material.

The Court: I don't think it does any harm; whether it does any good or not is something else.

Objection overruled.

By Mr. Maroney:

Q. Now, Mr. Gamber, at the time of conducting a search of Mr. Hayhanen's home on this evening, did you also seize a radio? A. Yes, I seized a radio which was located under a table in the living room of Reino Hayhanen's home.

Edward F. Gamber, for Government—Direct.

Q. And have you placed your initials on that radio?

A. My initials are on that radio, on the top of it.

Q. Do you recall whether you used a pencil or what?

A. It—the initials are in blue pencil.

(475) Mr. Maroney: Your Honor, counsel has—we don't have the radio in court.

It was introduced the other day as an exhibit with Mr. Hayhanen.

Counsel has agreed to stipulate that the radio that was introduced as Exhibit 24 is the same radio that was taken from Mr. Hayhanen's home by Mr. Gamber on May 12th.

The Court: And that was in connection with Mr. Hayhanen's testimony on October 15th?

Mr. Maroney: Yes, sir.

The Court: Very good.

By Mr. Maroney:

Q. Mr. Gamber, during the course of your search did you also seize some photographic equipment? A. Yes, we did.

We seized some photographic paper, both in a roll form and in a flat form.

We seized some photographic chemicals.

We seized some trays and beakers used in processing film.

We seized some frames for drying film.

We seized some hangers for drying film.

We seized an enlarger and a number of other (476) photographic articles, which I do not specifically recall at this time.

Mr. Maroney: No further questions, your Honor.

Mr. Fraiman: I have no questions, your Honor, at this time; however, may I ask the witness be made subject to recall as a possible defense witness?

John T. Mulhern, for Government—Direct.

The Court: In the event that the defense wishes to call Mr. Gamber as a defense witness, will Mr. Gamber be available?

Mr. Maroney: I am sure he will, your Honor.

(Witness excused.)

(477) JOHN T. MULHERN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Maroney:

Q. Mr. Mulhern, will you state your occupation? A. I am a Special Agent of the Federal Bureau of Investigation.

Q. Were you so employed on May 12th of this year? A. Yes, sir.

Q. Now, in the course of your official duties, did you have occasion on May 12, 1957, to assist in the conduct of a search at the home of Reino Hayhanen? A. Yes, sir.

Q. Did you on that occasion accompany Mr. Gamber in the conduct of that search? A. Yes, sir.

Q. Now, I show you what has been marked as Government's Exhibit No. 39 for identification, and ask you if you can identify that? A. Yes, sir. This is a cardboard carton containing loose nuts, bolts and screws.

Q. And did you and Mr. Gamber take that box from the home of Mr. Hayhanen on May 12, 1957?

(478) The Court: And the contents.

Q. And the contents? A. Yes, sir.

Q. Now, sir, will you tell us what you did with the box and the contents upon leaving Mr. Hayhanen's home?

A. We brought it to the New York office of the Federal Bureau of Investigation.

John T. Mulhern, for Government—Direct.

We placed it in the rear of the seventh floor, and I stood guard over this box and other evidence we took from Mr. Hayhanen's house, and at eight o'clock or thereabouts, on May 13, 1957, I turned this box and other evidence into the custody of Special Agent Simon Tullai.

(479) Q. Just to clarify one point, you stated you stood guard over the box all night and then turned it over to Mr. Tullai. The next morning. So that are we to understand that at the time you turned it over to special agent Tullai, the box was in the same identical condition and the contents were identical to the condition it was in when you seized it? A. Yes, sir.

* Q. I show you what has been marked Government's Exhibit 43 for identification and ask if you can identify that. A. Yes, sir, this box contains nine foreign coins which I located in a bureau drawer in Mr. Hayhanen's house on May 12, 1957.

Mr. Maroney: At this time, if your Honor please, we offer it in evidence, Government's Exhibit 43 for identification.

I amend the offer, your Honor, if your Honor please.

May I amend the offer to restrict the offer just to the coins that are contained in the box, not the box itself?

Mr. Fraiman: If your Honor please, the defense objects to the admission of these coins on the ground (480) they are not binding upon the defendant.

They were found at a time subsequent to the time that the witness Hayhanen cooperated with the Government, and on the further ground that at no time did the witness Hayhanen identify these coins; therefore, there is no showing that they are in any way connected with the alleged conspiracy in the indictment of this case.

Mr. Maroney: It seems to us, your Honor, Mr. Hayhanen is named as a co-conspirator in the indict-

John T. Mulhern, for Government—Direct.

ment and this evidence of the search of his home, we feel is admissible as to the—if only for corroborative purposes.

The Court: You think that he had made an admission on the 12th of May, 1957, that these coins were used or that these coins were intended to be used in the conspiracy, would that testimony be admissible against this defendant?

Mr. Maroney: No, sir, but I think here Mr. Hayhanen has testified that in the course of this conspiracy coins were used as containers for the transmitting of messages.

Now, he has also testified that on about May 4th or May 6th he went into the American authorities and (481) here—we have a search conducted of his home on May 12th, and there are coins found therein.

Now, it seems to us that at least it is admissible in so far as it shows corroboration of the witness' testimony.

The Court: I don't recall his testifying that he had coins in his home. Perhaps he did, but I don't recall.

Mr. Maroney: I don't recall he said that specifically, but he certainly did testify that he used coins, that he possessed them, and he used them in connection with his activities.

As a matter of fact, he identified one such coin here.

The Court: Yes, and that was received. I think that it is very doubtful if these are admissible.

If you would like to think it over and maybe dig up reasons to the contrary after lunch, I will give you a chance to do so, but it strikes me that the objection probably will be sustained.

John T. Mulhern, for Government—Direct.

(482) Mr. Maroney: Your Honor, may I hand this over to you?

(Mr. Maroney hands document to the Court.)

(483) The Court: This is the Grand Jury testimony?

Mr. Maroney: Yes, sir.

The Court: It will be convenient, will it not, Mr. Donovan, if I read this over between now and Monday and then make any announcement that seems to be appropriate?

Mr. Donovan: Yes, your Honor.

The Court: Now, have you thought of any reason why I shouldn't sustain the objection to those coins?

Mr. Maroney: Well, your Honor, no reason other than the reason advanced earlier to the effect that in the circumstances, that have been presented here, through the testimony, we feel that this is admissible as corroborative of the testimony of Mr. Hayhanen and, for that reason—

The Court: Did he make any reference to coins in his home? Did he say that he had any coins that were in his home, secreted or otherwise?

Mr. Maroney: I don't believe that he did, but I think he made it clear in his testimony that he used coins generally—

The Court: Yes.

Mr. Maroney: —in the performance of this conspiracy, and the fact that he was in possession (484) of coins so near after that which might be considered as an abandoning of the conspiracy, coins of the type that he said that he used in the conspiracy—

The Court: Well, it doesn't appear that there are any type now at all. All that appears thus far is that they are foreign coins.

I think that in the present state of the record I will sustain the objection.

John T. Mulhern, for Government—Direct.

Mr. Maroney: All right, sir.

Would the Government be permitted to elicit testimony as to the nature of these coins at a later time?

The Court: If they can't be received in evidence in the present condition of the record, what difference does it make what their nature is?

Mr. Maroney: If they were containers, or any of them were containers?

The Court: I think that perhaps you may ask the witness if he, in the course of his search, discovered any containers other than those to which he has thus far, perhaps, testified, when he identified both bolts and screws.

Mr. Maroney: I might just say, your Honor, that this witness could not so testify. I think he would (485) testify he transmitted them to somebody else. He could so testify.

The Court: I think that I will sustain the objection but without prejudice to your right to renew the offer if it later appears to be relevant.

Mr. Maroney: Yes, your Honor.

May I ask a further question with reference to this box of coins so that the record will be complete?

Direct examination (continued) by Mr. Maroney:

Q. When you found these coins, Mr. Mulhern, I think you said that they were in a bureau drawer; is that correct?

A. Yes, sir.

Q. They were not in this box? A. No, sir.

Q: What did you do with the coins when you took them out of the drawer? A. I put them in a white pillbox, and on top of the pillbox, I marked the fact that they were nine Finnish coins on the white pillbox; and I brought the pill-box (486) back to the New York office of the Federal Bureau of Investigation.

John T. Mulhern, for Government—Direct.

Q. Now, were those coins transmitted, in the normal course of business, from the New York headquarters of the Federal Bureau of Investigation to the Bureau Laboratory, the F. B. I. laboratory, in Washington? A. Yes, sir.

Q. I show you Government's Exhibit No. 42 in evidence and ask you if you can identify that (counsel hands document to witness.) A. (Witness examines document.)

In this package is a Dugan's bread wrapper.

Q. Were you with Mr. Gamber at the time that he or both of you dug up that bread wrapper? A. Yes, sir.

Q. And at the time—

The Court: That is Exhibit No. 42, I think.

Mr. Maroney: Yes, sir.

By Mr. Maroney:

Q. Now, did you or anyone else in your presence open the bread wrapper? A. No, sir.

Q. What did you do with it after you got it out of the ground? (487) A. We marked it. We put it with other evidence. We later brought it back to the New York office of the Federal Bureau of Investigation and on Monday, May 13, 1957, I mailed that bread wrapper to the Federal Bureau of Investigation laboratory in Washington, D. C.

Mr. Maroney: Will you mark this?

(A yellow box was marked Government's Exhibit No. 44 for identification.)

By Mr. Maroney:

Q. I show you what has been marked as Government's Exhibit No. 44 for identification, and ask you if you can identify that? (Counsel hands document to witness). A. (Witness examines exhibit.)

Yes, sir.

Q. Would you tell us where you received that, if you did receive it? A. Yes, sir. I found that in Mr. Hayhanen's house on May 12, 1957.

John T. Mulhern, for Government—Direct.

Q. And did you seize that during the course of the search? A. Yes, sir.

Mr. Maroney: At this time, if your Honor please, I offer in evidence Government's Exhibit No. 44 for identification.

(488) Mr. Fraiman: Defendant objects to its admission in evidence, your Honor, on the same ground as our objection to the offer in evidence of the nine coins that were previously offered.

Mr. Maroney: With respect to this exhibit, your Honor, the witness Hayhanen identified an exhibit of the same type, and actually, an identical exhibit, except a different object.

The Court: I didn't get that last.

Mr. Maroney: I say an identical exhibit, but a different object.

He identified it as having been received from the defendant.

The Court: Do you recall the exhibit number?

Mr. Maroney: 26, your Honor.

The Court: 26?

Mr. Maroney: Yes, sir.

I think that he further stated—

Mr. Tompkins: It is 27.

The Court: Yes. Exhibit No. 27 is a "film I mentioned in making microdots. This is one of five boxes I received from Mark."

Mr. Maroney: That's right, sir.

Mr. Fraiman: There has been no testimony what-
(489) ever that he had any of these other boxes in his home or in his possession, for that matter, your Honor.

The Court: He said, "Two or three I returned Mark when he came back from Moscow."

Mr. Fraiman: Yes, sir. I don't believe there is any testimony that he said that he had the remainder in his possession at any time.

John T. Mulheim, for Government—Direct.

The Court: I do not think so.

Isn't this subject to the same objection as the coins?

Mr. Maroney: I think in the light of the testimony, your Honor, that here we have a definite tieup.

The Court: You know what a direct answer is.

Is it subject to the same objection that the coins were?

"Yes, it is."

"No, it is not."

Mr. Maroney: I don't think so, your Honor.

The Court: Why?

Mr. Maroney: Because of the testimony given by the witness Hayhanen as to the receipt of such film and the number of boxes that were involved, the (490) number of boxes that he returned.

The Court: Now, just stop for a minute.

Suppose Hayhanen were on the stand and he were asked, being shown this box, "Is this one of the boxes that was in your house on May 12, 1957?"

Would he be permitted to answer the question?

Mr. Maroney: No, sir.

Not that way, I don't think so.

The Court: Objection sustained.

By Mr. Maroney:

Q. At the time that you conducted or assisted in the conduct of the search—

Mr. Maroney: I had better withdraw that question in view of your previous ruling, your Honor. I wonder if we could have just one minute? We are getting an exhibit which I would put as the last question to the witness.

The Court: By "one minute," do you mean one minute or more?

Simon Tullai, for Government—Direct.

Mr. Maroney: I think one minute. I think Mr. Palmiero has just stepped out and will be back.

By Mr. Maroney:

Q. Mr. Mulhern, I show you Government's Exhibit 27 in evidence and ask if you can identify that (counsel (491) hands document to witness.) A. (Witness examines box.)

Yes, sir.

Q. And where did you first see that box? A. In Mr. Hayhanen's house on 5-12-1957.

Q. And on that occasion did you take the box from Mr. Hayhanen's home? A. Yes, sir, I did.

Mr. Maroney: No further questions, your Honor.

Mr. Fraiman: I have no questions, your Honor.

The Court: No cross?

Mr. Fraiman: No, your Honor.

(Witness excused.)

(492) SIMON TULLAI, a witness called on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Maroney:

Q. Mr. Tullai, would you state your occupation, please?

A. Special Agent, Federal Bureau of Investigation.

Q. Were you so employed on May 13, 1957? A. Yes, sir.

Q. Now, directing your attention to the morning of May 13, do you recall where you were at that time? A. I was—I reported to work at approximately 7:30 A. M., on the morning of May 13, 1957, at the New York office of the F.B.I.

Q. I show you what has been marked as Government's Exhibit No. 30 for identification, (counsel hands box to

Simon Tullai, for Government—Direct.

witness), and ask if you can identify that? A. (Witness examines box.)

Yes, sir, I can.

Q. Would you state when you first saw that exhibit for identification? A. This was furnished to me on the morning of May 13, by Special Agent John T. Mulhern.

(493) It was placed in my custody, among other items.

Q. Now, what did you do, if anything, with that box, when you received it from Mr. Mulhern? A. This box I held in my custody.

I did not examine it that day. However, I did examine it on a subsequent day and went through the material contained in this box.

Q. Now, did you take anything from the box? A. Yes, I removed one item from this box.

Q. What was that item? A. I called it a bolt, although it is an item that has a screw type head on it, approximately two and one-half inches long.

Q. I show you a box marked Government's Exhibit No. 45, for identification, and I show you the contents and ask you if you can identify the contents (counsel hands box to witness.) A. (Witness examines box.)

Yes, sir. This is the bolt that I removed from the box.

Q. When you removed the bolt from the box, what did you do with it? A. I examined it and noticed that it was unusual.

Mr. Fraiman: If your Honor please.

(494) The Court: He was asked what he did and he said that he examined it.

Mr. Fraiman: I am sorry. I didn't mean to interrupt the witness, your Honor, but I object to the witness describing what the object is that he is holding in his hand, in the presence of the jury, in view of the fact that it is not in evidence.

The Court: He states that he examined it. So much of his answer stands.

Mr. Fraiman: Yes, sir.

Frederick E. Webb, for Government—Direct.

By Mr. Maroney:

Q. Then what did you do with it, if anything? A. I mailed it, registered mail, to the F. B. I. laboratory in Washington, D. C.

Mr. Maroney: At this time I withhold the offer, your Honor.

No further questions.

Mr. Fraiman: I have no questions, your Honor.

The Court: No cross.

(Witness excused.)

(495) FREDERICK E. WEBB, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Court: Will you defer just a moment, please?

Mr. Maroney: Yes, sir.

The Court: Yes, sir.

Direct examination by Mr. Maroney:

Q. Mr. Webb, will you kindly state your occupation, please? A. I am a special agent of the Federal Bureau of Investigation.

Q. What work are you assigned to in that capacity? A. I am assigned to the F. B. I. laboratory in Washington, D. C.

In particular I am assigned as a document examiner in the document section.

Q. In connection with that work, are you required to make examinations of documents for typewriting and handwriting and so forth? A. Yes, sir.

That work consists of making comparisons of (496) handwriting, handprinting, typewriting, examinations of printed material, examinations of paper, comparisons of related types of materials.

Frederick E. Webb, for Government—Direct.

Q. For how long have you been doing this work?

Mr. Fraiman: If your Honor please, I know Mr. Webb, and I am aware of the fact that he is an expert in his field.

(497) The Court: The jury may be interested in his qualifications.

Mr. Fraiman: Yes, sir.

The Witness: I have been doing this kind of work for a little over fifteen years.

By Mr. Maroney:

Q. Do you devote your full time to this work? A: Yes, I do.

Q. Will you tell us what your educational background is? A. I attended Central Missouri State College at Warrensburg, Missouri.

I received bachelor of arts and bachelor of science degrees.

I attended the University of Missouri at Columbia, Missouri, and received a master of arts degree there.

Q. While at these universities did you pursue any scientific studies? A. Yes. I have a major in science, physics, and chemistry.

Q. Will you state what you did to prepare yourself especially for the work you are now doing? A. I was trained for the particular work that I am now doing in the—after receiving my appointment to the F. B. (498) I, laboratory by the F. B. I.

I attended a regular prescribed course of training which was under the direction of examiners then in the laboratory.

I read material on the subject.

I made a study of cases and examinations, performed experiments, and after I reached a sufficient degree of proficiency in the work I was assigned cases to do on my own.

Mr. Maroney: Now, if your Honor please, on the basis of the stated qualifications I ask the Court's

Frederick E. Webb, for Government—Direct.

permission to proceed, not immediately but at a later time, in the course of Mr. Webb's testimony, with opinion evidence on some items that will be introduced.

The Court: Perhaps counsel would like to cross-examine him as to his qualifications.

Mr. Fraiman: No, your Honor. As I say, I am aware of Mr. Webb's qualifications and concede he is an expert.

The Court: Do you mean you wish to withdraw the witness?

Mr. Maroney: No, sir. I merely wish to establish at this point, if the Court will, that the (499) witness is qualified as an expert.

The Court: The record shows there is no cross examination on the subject.

Mr. Maroney: Thank you.

By Mr. Maroney:

Q. Mr. Webb, I show you Government's Exhibit 45 for identification, and ask you if you can identify the contents of the box so marked. (Counsel hands box to witness).

A. (Witness examines box.)

Yes, sir.

This is an item of evidence which was submitted to the laboratory and was examined by me.

Q. In other words, that was received at the laboratory in the normal course of business? A. Yes, sir.

Q. And it was examined by you, is that correct? A. Yes, sir.

Mr. Maroney: Would you mark this, please?

(Small box was marked Government's Exhibit No. 46 for identification.)

By Mr. Maroney:

Q. Would you tell the Court and jury the results of your examination of that?

Frederick E. Webb, for Government—Direct.

(500) Mr. Fraiman: Your Honor—

Mr. Maroney: I am sorry. It is not in evidence.

By Mr. Maroney:

Q. I show you what has been marked as Government's Exhibit 46, for identification, and ask if you can identify the contents of the box so marked.

(Counsel hands box to witness.)

And, without describing it, what the contents are. A. (Witness examines box.)

Yes, sir.

This was also examined at the laboratory by me.

Q. I show you Government's Exhibit 18, for identification, and ask if you recognize that. (Counsel hands photographic enlargement to witness.) A. (Witness examines photographic enlargement.)

Yes, I do.

Q. Would you state what it is in relation to Government's Exhibit—what is it—46, for identification?

The Clerk: Yes, 46.

The Witness: This Exhibit 18 for identification is a photographic enlargement made from Exhibit 46 for identification.

By Mr. Maroney:

(501) Q. Now, at the time of the examination in the F. B. I. laboratory of Government's Exhibit 45, for identification, where was Government's Exhibit 46 for identification? A. Government's Exhibit 46 for identification was inside Exhibit 45 for identification.

Q. In the course of your examination of Government's Exhibit 46 for identification, did you examine it?

First of all, would you state what it is, without telling us the contents or anything? A. 46?

Q. 46. A. 46 is a microfilm.

Frederick E. Webb, for Government—Direct.

Q. A microfilm. And at the time of your examination of Government's Exhibit 46 for identification, in the laboratory did you examine it to determine if it is hard film or some other kind of film? A. Government's Exhibit 46 for identification is microfilm which has had the backing or the film base removed from the microfilm, leaving the emulsion, or the top layer only, so that the microfilm is soft—then soft and pliable, being without the stiff backing which is commonly referred to as the film base, that having been dissolved away or removed.

(502) The thing that remains here is the top layer of that original microfilm, which is soft and pliable.

Q. Is that sometimes referred to as soft film, then? A. I have heard it so referred to, yes, sir.

Mr. Maroney: At this time, your Honor, we offer in evidence Government's Exhibits 45 for identification, 46 for identification, and 18 for identification.

Mr. Fraiman: If your Honor please, as I understand Mr. Maroney's offer, Government's Exhibit 46 for identification is a microfilm of which Government's Exhibit 18 for identification is a photostatic copy of the contents.

Is that correct?

Mr. Maroney: Yes, this is the microfilm (indicating), and this is a photographic print.

Mr. Fraiman: 18 is a print of Government's Exhibit 46.

I believe the testimony was that Government's Exhibit 45 was the container in which this microfilm was contained.

The defendant objects to the admission of all three exhibits, your Honor—45, 46 and 18, for identification—on the following grounds.

(503) With respect to Government's Exhibit 18, I believe on page 225 of the transcript reference was

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made to that exhibit or to an exhibit by the witness Hayhanen, which was Government's Exhibit 18.

Now, the witness at that time testified that he recognized the object that was shown to him as Government's Exhibit 18 but at no time did he testify what the object was or whether it was in any way connected in any shape, manner or form with the conspiracy charged in this indictment.

He merely said I recognize this exhibit and said nothing further about it.

The Court: Have you read the entire page two hundred twenty-five?

Mr. Fraiman: Yes, your Honor.

The Court: What do you think line 25 means? "I put it into a bolt."

Mr. Fraiman: Yes, your Honor. He never did say which bolt he put it into. That wasn't shown.

The Court: If the jury doesn't think this is the one, the jury will reject it.

The objection is overruled.

Mr. Fraiman: Might I state my objection with respect to the admissibility of Government's Exhibit (504) 46, which is the bolt itself?

The Court: Yes.

Mr. Fraiman: In that there was no identification by Hayhanen as to that specific bolt.

The Court: That is true, but there is the testimony that I have read, that he put the film in a bolt.

Now, if the jury doesn't believe this is the bolt, they will reject the testimony or at least they will reject the exhibit as proving anything.

(Government's Exhibits 18, 45 and 46, heretofore marked for identification, were marked and received in evidence.)

Frederick E. Webb, for Government—Direct.

By Mr. Maroney:

Q. Mr. Webb, I show you Government's Exhibit 42 in evidence and ask if you can identify the contents of that cellophane package.

(Counsel hands cellophane package to witness.)

A. (Witness examines cellophane package.)

Yes, sir.

This was also one item received in the laboratory for examination.

Q. Now, that was received at the laboratory in the normal course of business, was it? (505) A. Yes, sir.

Q. And was it examined in the F. B. I. laboratory under your supervision? A. Yes, sir. I examined this evidence.

It was in little different condition and the parts were within the—there is a cellophane wrapper here. The other parts here, consisting of an envelope, a window envelope, and some cleansing tissue, and another item were in the cellophane wrapper, which is really a bread wrapper.

Q. In other words, when you received the package in the laboratory, the bread wrapper enclosed what was inside, is that correct? A. That's right.

Q. And you then opened the bread wrapper? A. Yes, I did.

Q. Do I understand your testimony that the other objects that are now in the exhibit were contained within the bread wrapper? A. That is right. That is correct.

Q. Now I show you Government's Exhibit 19 in evidence (counsel hands exhibit to witness), and ask if you can identify that. A. (Witness examines exhibit.)

Yes, sir.

(506) Government's Exhibit 19, for identification, is the item—

The Court: Just a moment. Is that in evidence?

Mr. Maroney: Yes, sir.

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The Court: Then don't say for identification, please.

The Witness: I am sorry. Yes, sir.

The Court: Government's Exhibit 19.

The Witness: Government's Exhibit 19 is the item which was—which I found in Government's Exhibit 42.

By Mr. Maroney:

Q. And at the time you removed Government's Exhibit 19 from within the bread wrapper, did you place your initials on Exhibit 19? A. I don't recall that I placed my initials.

Yes, I did.

I photographed it. I also placed my initials here.

Q. Did you conduct an examination of Exhibit 19?

A. Yes, I did.

Q. With respect to the typewriting appearing thereon?

A. I found, from a comparison—

The Court: Did you?

(507) The Witness: Yes, I did.

By Mr. Maroney:

Q. Would you state to the Court and jury what your examination revealed? A. I compared the typewriting on this exhibit, Exhibit 19, with standards that we have in file and found that this typewriting was made by a continental type of typewriter.

The typewriting here, the typewritten characters or individual letters, measure about eleven and one-half to the inch. That is a kind of machine which is manufactured in Germany. It is not a machine of—manufactured in this country.

Q. Now, Mr. Webb, have you caused to be made photographic enlargements of Government's Exhibit 45, the bolt

Frederick E. Webb, for Government—Direct:

(indicating), which reflects how the bolt operated? A. Yes, I have.

(508) Q. Have you also caused to be made photographic enlargements of the bread wrapper, Government's Exhibit 42, showing the bread wrapper and the contents at the time it was opened in the Bureau laboratory? A. Yes, sir.

Q. Have you made similar photograph enlargements of the birth certificate, Government's Exhibit 19? A. Yes, I have.

Q. And I think I omitted one.

Have you also caused to be made a photographic enlargement of Exhibit 46, in evidence? A. Yes, sir, I have.

Q. And are those enlargements that you have prepared or caused to be prepared true and accurate reproductions of the items that they represent? A. Yes, they are.

Mr. Maroney: Now, at this time, if your Honor please, we request permission to bring those trees with the bar on them so Mr. Webb could place the charts and demonstrate to the jury the working of the bolt and the other enlargements.

The Court: Surely.

Mr. Fraiman: May I ask if Mr. Maroney is offering these charts in evidence? I believe they (509) should be offered in evidence before he shows them to the jury.

Mr. Maroney: I do offer them in evidence, your Honor, and I will have them marked immediately.

The Court: As one exhibit?

Mr. Maroney: I think as one exhibit.

The Court: Or you could mark them with an A letter with reference to each exhibit.

Mr. Maroney: I think that would be better, your Honor.

The Court: The first one is what?

Mr. Maroney: The first one is the bolt, so that it should be Government's Exhibit 45-A.

Frederick E. Webb, for Government—Direct.

By Mr. Maroney:

Q. Mr. Webb, may we have the charts? A. (Witness hands charts to counsel.)

(Chart showing enlargement of bolt was marked Government's Exhibit 45-A for identification.)

The Court: Now, the next I have after 45-A is what? 46-A?

Mr. Maroney: 46-A, yes, sir.

The Court: And that is a photographic enlargement of the microfilm?

Mr. Maroney: That is correct.

(510) (Chart of photographic enlargement of microfilm was marked Government's Exhibit 46-A for identification.)

The Court: And 18-A is the photograph enlargement of the birth certificate?

Mr. Maroney: No. The next will be a photographic enlargement of Exhibit 42 and also Exhibit 19.

The Court: 42 then becomes our next. That is the bread wrapper?

Mr. Maroney: And the contents, yes, sir.

(Photographic enlargement chart of bread wrapper and contents was marked Government's Exhibit 42-A for identification.)

The Court: And 19-A is the birth certificate?

Mr. Maroney: Yes, sir.

(Chart of photographic enlargement of birth certificate was marked Government's Exhibit 19-A for identification.)

The Court: Those are all offered?

Mr. Maroney: We offer them, yes, your Honor.

Frederick E. Webb, for Government—Direct.

Mr. Fraiman: I have no objection, your Honor, other than my objection to the original admission in evidence of the original objects.

The Court: Then I am just recording that there (511) is no objection to these as enlargements.

Mr. Fraiman: That is correct.

(Charts heretofore marked Government's Exhibits 46-A, 45-A, 42-A and 19-A for identification were marked and received in evidence.)

The Court: Don't you think you had better move that closer to the jury box?

(The charts were moved closer to the jurybox).

The Court: Now perhaps defendant and defendant's counsel will wish to take positions over here (indicating).

Mr. Fraiman: May we, your Honor?

The Court: So that you can see these enlargements while they are being the subject of testimony.

Mr. Fraiman: I think, your Honor, we will move around back behind.

The Court: Yes, surely.

Mr. Maroney: Your Honor, I am going to ask Mr. Webb to demonstrate examination of the bolt, and would your Honor permit him to step down to the chart?

(512) The Court: Yes, but I think the defendant and his counsel should be removed a little bit from the government's counsel table.

Yes, surely.

Now, members of the jury, can you see that or do you wish it moved closer?

Foreman of the Jury: It is fine.

The Court: By "that," I mean a rack which contains these four enlargements.

Frederick E. Webb, for Government—Direct.

The Witness: The enlargement I am showing here now is an enlargement marked Exhibit No. 45-A. The object in the upper left corner is an enlargement of Exhibit 45 showing it in the condition in which it was received in the laboratory.

This exhibit was found to be actually a container, and the top was threaded to fit into the remainder of the container, and the top came off and enclosed, wrapped in some thin white paper,—the white paper is still inside (indicating),—was a small microfilm.

The microfilm when examined was found to have the—to have had the film base, the stiff part, removed by dissolving it or by some other means, and that microfilm was mounted between glass be- (513) cause it was very soft and would not lie flat otherwise and placed in the enlarger and an enlargement made from it.

And this (indicating) is a resulting enlargement which is the second chart here, and is an enlargement similar to Government's Exhibit No. 18, except with regard to the degree of enlargement it is still more of an enlargement, of course.

The Court: You mean it is on a larger scale?

The Witness: Yes, sir. It is on a larger scale. That is the only difference.

By Mr. Maroney:

Q. Before proceeding, Mr. Webb, would you read Government's Exhibit No. 46-A? [Exhibit 18 enlarged] A. Government's Exhibit No. 46-A reads:

"Quebec. Roy A. Rhodes, born in"—the "in" isn't there. I am sorry.

"Born 1917 in Oilton, Oklahoma, U. S., Senior Sergeant of the War Ministry, former employee of the U. S. Military Attache Staff in our country. He was a chief of the garage of the Embassy.

"He was recruited to our service in January, 1952 in our country which he left in June, 1953.

Frederick E. Webb, for Government—Direct.

Recruited on the basis of compromising materials but he is tied up to us."

(514) The Court: "He is tied up"?

The Witness: "He is tied up to us with his receipts and information he had given in his own handwriting.

"He had been trained in code work at the Ministry before he went to work at the Embassy but as a code worker he was not used by the Embassy.

"After he left our country he was to be sent to the School of Communications of the Army C. I. Service which is at the City of San Luis, California. He was——"

The Court: That is "L-U-I-S."

The Witness: L-U-I-S.

"He was to be trained there as a mechanic of the coding machines.

"He fully agreed to continue to cooperate with us in the states or any other country. It was agreed that he was to have written to our Embassy here special letters but we had received none during the last year.

"It has been recently learned that Quebec is living in Red Bank, N. J."

N. J., the abbreviation for New Jersey.

"Where he owns three garages. The garage job (515) is being done by his wife. His own occupation at present is not known.

"His father, Mr. W. A. Rhodes, resides in the U. S. His brother is also in the States where he works as an engineer at an Atomic Plant in Camp, Georgia, together with his brother-in-law and his father."

By Mr. Maroney:

Q. Sir, would you then go to Exhibit No. 42-A? (516)

A. Exhibit No. 42-A is an enlargement of a photograph

Frederick E. Webb, for Government—Direct.

that was made of Exhibit 42 as it was disassembled or taken apart in the examination in the laboratory.

On the left is shown a cellophane wrapper which is a Dugan's bread wrapper, which enclosed, this was folded around to about a third, only a third of it, the original size was only a third of the total size shown here. The other items were all enclosed within the bread wrapper.

The next item in the bread wrapper was the window envelope and within the window envelope there was enclosed this folded cleansing tissue, inside that folded down to a square about two inches by three inches, or an inch and three-quarters, this certified copy of birth record which is a certified copy of birth record of the Oregon State Board of Health, Division of Vital Statistics.

The Court: Concerning whom?

The Witness: This is concerning the birth of Lauri Arnold Ermas,—the next enlargement shows the name large enough to see and this enlargement is 19-A.

Lauri Arnold Ermas.

This individual is shown on this birth certificate.

(517) The Court: What is that second name?

The Witness: Arnold, A-R-N-O-L-D.

The Court: And the third name?

The Witness: Ermas, E-R-M-A-S.

According to this birth record, this individual was born in Multnomah County, Oregon, City of Portland; Wilcox Memorial Hospital. Local register number was 328.

The Court: And the date?

The Witness: The date of birth was 7-23-20, or July 23, 1920.

Q. Go ahead, Mr. Webb. A. No, this is the typewriter about which I testified before, which the formation of the type shows that it was made or produced with a type-

Frederick E. Webb, for Government—Direct.

writer manufactured in Germany. It is a Continental make of typewriter and the—the original copy, Government's Exhibit No. 19, the type measures $11\frac{1}{2}$ to the inch, which is not a standard measurement on typewriters of this kind; for machines manufactured in this country.

Mr. Maroney: We have no further questions at this time on direct examination. However, I would like to point out that with this witness we would request the Court's permission to withdraw him with the (518) understanding that he could come back later and testify as to other matters.

The Court: That was our arrangement yesterday, wasn't it?

Mr. Fraiman: As I understand, your Honor, his subsequent testimony will be in the capacity of an expert?

The Court: Yes, and concerning other matters not the subject matter that was given on direct examination today.

Do you wish to cross examine him?

Mr. Fraiman: I have no cross examination on this, your Honor.

No cross for the present.

The witness is subject to be recalled for direct testimony on other subjects.

Mr. Fraiman: I understand as an expert.

The Court: As an expert, I assume so.

Mr. Maroney: At this time, if your Honor please, we would like to offer in evidence, Government's Exhibit No. 47 for identification, which is a certified copy, a certification from the Oregon State Board of Health containing records, reproductions of records, original records on file in the (519) Vital Statistics Section of the Oregon State Board of Health and a certification as to failure to find a document.

The Court: Have you shown it to the other side?

Frederick E. Webb, for Government—Direct.

Mr. Fraiman: Yes, your Honor, I have seen it. There is no objection.

The Court: You say it is a certification?

Mr. Maroney: It is a certification by the State Registrar of Oregon, who is the custodian of vital statistics records filed in the State of Oregon.

The Court: Dated?

Mr. Maroney: 20 September, 1957.

The Court: And he certifies in the negative?

Mr. Maroney: Certifies in the negative and also attaches a certified copy of a birth certificate, local register number 328, Oregon State Board of Health.

I would like to read this to the jury, your Honor.

The Court: I hope you will, because I don't begin to understand what he certifies to yet.

Mr. Maroney: This is on the letterhead of the State of Oregon, Oregon State Board of Health, Portland.

(520) "This is to certify that I am the authorized custodian of vital statistics, records filed in the state of Oregon.

"I have caused to have made a diligent search of the files of the Oregon State Board of Health and of the City of Portland, Bureau of Health, for a birth certificate of Lauri Arnold Ermas, presumed to have been born in this state in July, 1920.

"Such search failed to disclose an original birth certificate for Lauri Arnold Ermas for the years 1919 to 1921, and specifically there was no such record for the month of July, 1920. Further, the authorized local file number of 328 for the year 1920 does not refer to any record for Lauri Arnold Ermas but does however refer to the birth record of Doris Mae Anderson, a certified copy of which is attached."

And attached to that is the certified copy of the birth record of Doris Mae Anderson which is local register No. 328.

George G. Steel, for Government—Direct.

The Court: Well, the effect of what you have read is this, if I understand you, the custodian of vital statistics certifies that Exhibit No. 19 in this case has no original in the records of the state of Oregon.

(521) Mr. Maroney: That is correct, your Honor.

GEORGE G. STEEL, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Maroney:

Q. Will you state your occupation, please? A. I am a special agent with the Federal Bureau of Investigation.

Q. Were you so employed on May 16, 1957?

Mr. Fraiman: I am sorry, I didn't hear the date.

Mr. Maroney: May 16th.

By Mr. Maroney:

Q. You were? A. Yes, sir.

Q. Now, on that date in the course of your official duties did you have occasion to conduct a search of the home of Reino Hayhanen? A. Yes, I did.

Q. Did you know him by any other name? A. Maki was the other name.

Q. I show you Government's Exhibit 31 and ask if you (522) can identify that. A. Yes. This is one of the bolts I found in the home at the time of the search.

Q. On that occasion did you take possession of the bolt that you found? A. Yes, I did.

Q. Exhibit 31? A. Yes.

Q. I show you what has been marked as Government's Exhibit 48 for identification and ask if you can identify that. A. Yes. That is another of the bolts found in the same search.

George G. Steel, for Government—Direct.

Q. And at the time of finding it, the bolt on Mr. Hayhanen's home, did you take possession of the bolt? A. Yes, I did.

Q. Was that pursuant to a consent to search and seize the premises? A. Yes, it was.

Mr. Maroney: At this time, if your Honor please, I offer in evidence Government's Exhibit 48 for identification.

Mr. Fraiman: Your Honor, I don't recall any testimony by the witness Hayhanen with respect to this (523) bolt. I therefore object to its admission into evidence on the ground that it is not binding upon the defendant.

The Court: Doesn't this fall in the classification of the coins?

Mr. Maroney: Well, sir, in this particular instance, the witness Hayhanen when he was testifying identified Exhibit 31.

The Court: Yes, but you are not offering 31, you are offering 48.

Mr. Maroney: And he first testified that he had containers of that type in his home.

The Court: That isn't the—Doesn't this fall within the coin classification? Suppose he were on the stand and shown Exhibit 48 for identification and was asked whether that was a bolt he had in his home on May 16th? Wouldn't the objection have to be sustained?

Mr. Maroney: I think it would.

The Court: I do.

Now, as to 31, he said this is such as I used and received.

Mr. Maroney: No further questions.

(526) Mr. Maroney: At this time, if your Honor please, the Government offers in evidence the rental records of 252 Fulton Street in Brooklyn.

Government Exhibit No. 49

It is our understanding that counsel has agreed to stipulate that these records are true and accurate copies of the records kept in the normal course of business for the rental of the property at 252 Fulton Street in Brooklyn.

The Court: I think you had better be more specific when you say "the property at 252 Fulton Street."

Mr. Maroney: Specifically, your Honor, we offer the records showing the rental by Emil Goldfus of studio 505, at 252 Fulton Street. The rental (527) contract was entered into December 17, 1953, to commence January 1, 1954, and the rental records reflect continued occupancy by Emil Goldfus of Studio 505.

The Court: Goldfus was the tenant?

Mr. Maroney: Yes, sir.

The Court: Who was the landlord?

Mr. Maroney: The Waterman Realty Company.

The Court: Waterman?

Mr. Maroney: Yes, sir.

The Court: And you say the studio was—

Mr. Maroney: Studio 505.

The Court: 505.

Mr. Maroney: Rented continuously during the period from January 1, 1954 through August 1957.

The Court: And was that address 252?

Mr. Maroney: 252 Fulton Street.

The Court: Is this Exhibit 48?

The Clerk: That will be 49, your Honor.

The Court: 49. And to that there is no objection?

Mr. Maroney: Yes, sir. And we also offer these records insofar as they reflect the rental of storage space, room 509 in the same building, during the period from June 1955 through July 1957.

(528) And at this time I also—

Mr. Fraiman: Your Honor, with respect to this exhibit we have no objection to its receipt in evi-

Ernest Tripelhorn, for Government—Direct.

dence. I gather that it is a photostat that, I believe, Mr. Maroney is offering.

(Rental records of 252 Fulton Street, were marked and received in evidence as Government's Exhibit No. 49.)

Mr. Maroney: At this time we also offer a booklet, a photograph in which was previously received as Government's Exhibit No. 12, in evidence, and may I ask at this time that the entire booklet be considered as Government's Exhibit 12 and received in evidence, it being our understanding that counsel stipulate that this is a copy of a booklet which is on file in the office of the United States Mission to the United Nations.

The Court: So that Exhibit No. 12 in its entirety is now offered and received, without objection, is that it?

Mr. Fraiman: That is right.

(Booklet was marked Government's Exhibit No. 12 and received in evidence.)

(529) ERNEST TRIPELHORN, JR., a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Featherstone:

Q. What is your full name, please? A. Ernest Tripelhorn, Jr.

Q. Where do you reside, Mr. Tripelhorn? A. 235 East 73rd Street, New York City.

Q. In what kind of business are you engaged? A. Real estate.

Q. Are you acquainted with the defendant? A. Yes.

Q. Do you recognize him? A. Yes, I do.

Ernest Tripelhorn, for Government—Direct.

Q. By what name did you know the defendant? A. Mr. Goldfus.

Q. By what full name? A. Emil R.

Q. Did you have business dealings with Mr. Goldfus?

A. Yes.

Q. Have you brought with you—

The Court: Is there any question that the (530) witness identifies the defendant in this case?

Mr. Fraiman: No question.

By Mr. Featherstone:

Q. Have you brought with you, Mr. Tripelhorn, certain records of your business dealings with Mr. Goldfus? A. I have.

Q. Would you produce them, please? A. Yes.

(Witness hands documents to counsel.)

(Documents referred to were marked Government's Exhibits Nos. 50 and 51 for identification.)

By Mr. Featherstone:

Q. Mr. Tripelhorn, I show you what has been marked Government's Exhibit No. 50 for identification, and ask you whether these are records kept in the ordinary course of your business (counsel hands documents to witness.)

A. (Witness examines documents.) Yes.

Q. Are you the custodian of these documents? A. That is correct.

Q. I show you what has been marked Government's Exhibit No. 51, for identification, and ask whether this is a regular record kept in the normal course of your business (counsel hands document to witness)? (531) A. (Witness examines document.) That is.

Q. Are you the custodian of this document? A. Yes.

Q. Mr. Tripelhorn, has Mr. Goldfus, that is, the defendant, ever written his signature in your presence? A. Yes.

Ernest Tripelhorn, for Government—Direct.

Mr. Featherstone: I offer these in evidence now.

The Court: Will you read that question, please?

(Record read.)

By Mr. Featherstone:

Q. Mr. Tripelhorn, can you identify the signature on this lease as that of Mr. Goldfus (counsel hands document to witness)? A. (Witness examines lease.) Yes. He signed this in front of me.

Q. And the signature on the application for the lease, can you identify that (counsel hands application for lease to witness)? A. (Witness examines application.) Yes, that was signed in front of me also.

Q. Mr. Tripelhorn, can you identify the signature on Government's Exhibit No. 51, for identification, as that of Mr. Goldfus (counsel hands document to witness)? (532) A. (Witness examines document.) That is very similar to this signature that is on the lease.

I didn't actually see him sign this. This was a letter sent to me, but the signature is the same—appears to be the same as on the lease.

Mr. Fraiman: I object to what the witness testifies it appears to be.

The Court: I think that goes to the weight of the evidence. If the jury thinks that the witness isn't competent to compare the two, the jury will disregard his statement.

The witness said that he didn't see him sign.

Mr. Featherstone: I offer these in evidence at this time.

Mr. Fraiman: No objection, your Honor..

(Documents heretofore marked Government's Exhibits 50 and 51, for identification, were received in evidence.)

Mr. Featherstone: No further questions.

Ernest Tripelhorn, for Government—Direct.

The Court: Just a minute. There may be some cross.

Mr. Fraiman: No cross examination.

(Witness excused.)

(533) The Court: While we are waiting for another witness, I wish to state in the record that I have examined the copy of the testimony of the witness Hayanen before the Grand Jury, which transcript was furnished to me by the Government.

I find in that testimony no contradictions or departures from or discrepancies in the testimony compared to that which the witness gave on the stand in this trial.

The only matter that occurred to me that I should speak to counsel about is this. I think before the Grand Jury Hayhanen was asked if Asko—what is that name?

Mr. Tompkins: Asko.

The Court: Asko. He was asked if Asko was his courier. That expression was used. And he said, "Yes."

Now, it isn't my memory that the word "courier" was used in his testimony but perhaps it was.

Mr. Tompkins: I believe it was, your Honor.

The Court: Well, perhaps so.

I am returning this transcript to Government's counsel.

(The court hands transcript to Mr. Tompkins.)

(534) Mr. Tompkins: Thank you.

Burton Silverman, for Government—Direct.

BURTON SILVERMAN, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Maroney:

Q. Would you state your address, Mr. Silverman, please? A. You mean my home address?

Q. Your home address. A. 156 Montague Street.

Q. What is your occupation? A. I am an artist.

Q. Do you know one Emil R. Goldfus? A. Yes.

Q. Do you see him in the court room? A. Yes.

Q. Would you indicate where you see him? A. Sitting at the table over there (indicating).

Mr. Maroney: May it be stipulated that the witness has identified the defendant?

By Mr. Maroney:

Q. Now, would you state when you first met the (535) defendant? A. I think it was in December of 1953 or in February—the end of 1953, early 1954.

Q. And have you known him continuously since that time?

Have you had association with him? A. Yes.

Q. During that period of time, did you know him by any name other than Emil R. Goldfus? A. No.

(536) Q. Do you, sir, have a studio in 252—the building located at 252 Fulton Street, in Brooklyn? A. Yes, I do.

Q. To your knowledge did the defendant also have a studio in that building? A. Yes.

Q. Do you recall the room number of his studio? A. 505.

Q. I show you what has been marked as Government's Exhibit No. 52 for identification and ask you if you can identify that? A. This, apparently, is a machine that I borrowed from Mr. Goldfus. I think it was towards the

Burton Silverman, for Government—Direct.

end of April or around that time. I am not quite sure of the date.

The Court: Is this a typewriting machine?

The Witness: Yes.

Q. And you say you borrowed it from the defendant?
A. Yes.

Q. In approximately the end of April of this year? Is that correct? A. That is right.

Q. Now, prior to borrowing the typewriter from the defendant had you had occasion to visit the defendant's studio in Room 505 at 252 Fulton Street? (537) A. Yes.

Q. And on the occasions of the visits did you notice a typewriter in the room? A. I think I had noticed a typewriter in the room. I knew that the defendant had the typewriter. I had seen it there before. I am not sure at what time previous to that, but I was aware of the typewriter.

Q. And this is the typewriter that you borrowed from the defendant? A. Yes.

Mr. Maroney: May we have this marked Exhibit 52-A, since it refers to the typewriter, your Honor?

(Paper marked Government's Exhibit No. 52-A for identification.)

Q. I show you what has been marked as Government's Exhibit No. 52-A, which purports to contain a signature at the bottom, and I ask you if that is your signature, sir?
A. Yes.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit No. 52 for identification.

(The typewriter referred to was received in evidence as Government's Exhibit No. 52.)

Burton Silverman, for Government—Direct.

(538) Mr. Fraiman: Your Honor, may I ask the witness a few questions on the *voir dire* with respect to this typewriter?

The Court: Yes.

By Mr. Fraiman:

Q. I gather that this is a Remington portable typewriter? A. Yes.

Q. Does it differ in any respect from any other Remington Portable typewriter to your knowledge? A. No. From my acquaintance with typewriters I would say that it looks like any other of the same kind.

Q. Is there something peculiar about this typewriter that enables you to distinguish it from other Remington portable typewriters? A. The only way that I have of knowing that this is the typewriter, is the fact that the serial number on the back of the typewriter is on the receipt that I had—

Q. From— A. From an F. B. I. agent who visited me early in August.

Q. A receipt from an F. B. I. agent? A. Yes.

Q. There is no other way that you can tell that this is the same typewriter that you received from this defendant (539) ant? A. No, aside from this receipt, no.

Mr. Fraiman: I object to its receipt.

The Court: You object to what?

Mr. Fraiman: I object to the receipt of the typewriter in evidence. There is no showing—

The Court: I thought you did not object.

Mr. Fraiman: I am sorry—

The Court: The witness has identified the machine as the one he received from the defendant.

Mr. Fraiman: He just testified, I believe, however, your Honor, that he can't distinguish this from any other Remington portable typewriter.

Burton Silverman, for Government—Direct.

The Court: Did you receive more than one machine from the defendant?

The Witness: No.

The Court: Did you deliver the machine you received from the defendant to the F. B. I.?

The Witness: Yes.

The Court: Objection overruled.

Mr. Maroney: May I also ask one or two questions along that line, your Honor, in connection with the turning over of the typewriter?

The Court: Yes.

(540) By Mr. Maroney:

Q. You have previously identified Exhibit No. 52-A as containing your signature; is that correct? A. That is right.

Q. And can you state what the document is, without giving us its contents? A. It states that I turned—

Q. No, no; what is it? A. It is a form of a declaration rather than a receipt. It states that I, Burton Silverman, have turned over the following machine.

Q. And does this receipt reflect the serial number of the typewriter which you turned over to the F. B. I.? A. Yes.

Q. And that was—

The Court: Not only reflects—it states it, doesn't it?

The Witness: Yes. It is the same—it is an identical number.

Mr. Maroney: At this time, if your Honor please, I offer in evidence Government's Exhibit No. 52-A.

Mr. Fraiman: I object to the receipt going in evidence, your Honor. The typewriter is already (541) in evidence.

The Court: I wonder how that can be binding on the defendant?

Burton Silverman, for Government—Cross.

Mr. Maroney: Just for the purpose of showing the number, the serial number, of the typewriter which was used—

The Court: Why don't you gentlemen agree in the record on what the serial number of the typewriter is? It appears on it, doesn't it?

Mr. Maroney: Yes.

The Court: Then open it, look at it, read it, and agree to it.

Mr. Maroney: Yes, sir.

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Mr. Fraiman: I will so stipulate:

Mr. Maroney: No further questions.

The Court: Any cross?

Mr. Fraiman: Yes, your Honor.

Cross examination by Mr. Fraiman:

Q. Mr. Silverman, approximately how long was it that you actually have known the defendant, sir? A. Since he moved into the studio building at which I (542) have a studio.

Q. That was the end of 1953? A. That is right. I believe it was that time. I am fairly sure.

Q. In the course of your acquaintance with the defendant did you visit him on a number of occasions? A. Yes.

Q. Did you converse with him frequently? A. Yes.

Q. And did he in turn visit you on a number of occasions? A. Yes.

Q. Did he also visit your family?

Mr. Maroney: Objection, your Honor.

The Court: Why?

Mr. Maroney: Visiting his family I think is beyond the scope of the direct.

The Court: It all goes to the question of their acquaintanceship.

A. By my family do you mean by immediate family?

Burton Silverman, for Government—Cross.

Q. Yes. A. Well, the defendant visited me and my wife directly after we were married.

Q. That is what you refer to? (543) A. Yes.

Q. And you were friends with the defendant—you and your wife were on friendly terms with the defendant throughout this period, were you not? A. Yes.

Q. Did you also know other people who knew the defendant? A. I knew other people who knew the defendant, yes.

Q. And in the course of your acquaintance with the defendant did you ever have occasion to discuss the defendant's reputation with these other people? A. I don't understand the meaning of that question.

Q. Did you ever talk about the defendant with other people? A. Oh, yes.

Q. And what was the defendant's reputation in the community for honesty and integrity?

Mr. Maroney: Objection, your Honor.

The Court: Oh, I think I will allow it.

Did you ever discuss his reputation—

The Witness: Yes.

The Court: —with other people?

The Witness: Yes. Very definitely.

The Court: For truth telling?

(544) The Witness: Yes. It was beyond reproach.

Q. Beyond reproach? A. Yes.

Q. Did you ever hear anything bad about the defendant in any way, sir? A. No.

Mr. Fraiman: I have no further questions.

The Court: And these discussions had to do with a man by the name of Goldfus. Is that it?

The Witness: Yes.

Mr. Maroney: No redirect, your Honor.

May the witness be excused?

The Court: As far as I am concerned.

(Witness excused.)

Robert R. Clark, for Government—Direct.

(545) ROBERT R. CLARK, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Palermo:

Q. Mr. Clark, will you tell the Court and jury by whom you are employed? A. Eastman Kodak Store Incorporated, No. 1 West 39th Street, New York City.

Q. In what capacity are you employed by the Eastman Kodak Store? A. Office and credit manager.

Q. Would you tell the Court and jury briefly your duties as office and credit manager of the store? A. Well, as office manager I am responsible for the preparation and maintenance of records having to do with the normal course of business, and as credit manager I am responsible for the establishment of accounts, the okaying of charge purchases, and the collection of the bills.

Q. How long have you been employed as office and credit manager? A. By Eastman Kodak Store Incorporated more than ten years.

Q. More than ten years? (546) A. More than ten years.

Q. Were you so employed during the period of November, 1952, to January, the end of January, 1953? A. I was.

Q. And you are now so employed? Is that correct? A. I am.

Q. Mr. Clark, will you describe briefly the procedure which is followed in your store when an order for an unstocked item is placed? A. The salesman that had contact with the customer would list the item that was to be purchased and would relay it to the purchasing agent who in turn would make out an order for the particular item wanted.

Q. Once the item had been received, what would then happen? How would you further record the sale of the particular item? A. Well, if it is a cash transaction it would go through as a cash sale. If it were a charge transaction, it would go through as a charge purchase.

Robert R. Clark, for Government—Direct.

Q. And if it were a cash transaction what records would you have in your firm. A. We would have a cash sale to substantiate the delivery of that particular order.

Q. Mr. Clark, did you bring any records with you (547) from the Eastman Kodak Store? A. Yes, I have some records.

Q. May I have them, please? A. (Witness produces records.)

Mr. Palmero: Mark these for identification, please.

(Records marked Government's Exhibits Nos. 53, 54, 55 and 56 for identification, respectively.)

Q. Mr. Clark, I show you now what is marked Government's Exhibit No. 53 for identification and ask you if you can identify it? A. This is Purchase Order No. F7002, which was addressed to Eastman Kodak Company, Rochester, New York—

Don't tell the contents yet, please. A. I see.

Q. I show you, now, Government's Exhibit No. 54 for identification, and ask you to identify that? A. That is Cash Sale No. 30-13, of the Eastman Kodak Store.

Q. I show you Government's Exhibit No. 55 for identification and ask you to identify it? A. This is a subsidiary ledger which we term a miscellaneous payable ledger in which were recorded deposits and miscellaneous cash items received by the cashier.

(548) Q. And lastly I ask you to identify, if you can, Government's Exhibit No. 56 for identification? A. This is page No. 756 containing entries covering the day of November 25, 1952; applicable to accounts receivable and also cash sales and deposits.

Q. Now, are all of these exhibits for identification which you have before you now, Government's Exhibits Nos. 53, 54, 55, and 56 for identification, true and accurate? A. They certainly are.

Robert R. Clark, for Government—Direct.

Q. Were these exhibits made and kept under your supervision and direction? A. They were, sir.

Q. Were they made in the regular course of business? A. In the regular course of business.

Mr. Palermo: May I have the exhibits, please?

A. (Witness hands exhibits.)

Mr. Palermo: At this time, your Honor, I wish to offer Government's Exhibits Nos. 53, 54, 55, and 56 for identification in evidence.

Mr. Fraiman: I have no objection.

Mr. Palermo: At this time, if your Honor please, we would like the witness to explain these exhibits.

(549) The Court: Well, will you explain something for my curiosity's sake?

Mr. Palermo: Yes, your Honor.

The Court: What reference have these records to this defendant?

Mr. Palermo: That is exactly what I would like to have the witness explain now, your Honor.

The Court: I think it is time that you touched that subject.

Q. Mr. Clark, would you examine Government's Exhibit No. 53 and explain it to the Court and jury? A. Well, Order No. F7002, dated November 25, 1952, evidences that there was an order placed for 35 mm. by 100 feet spectroscopic film #649 GH, wood core, and it was for a customer who gave the name of E. R. Goldfus.

The "WC" indicates a "will call," which meant that the customer would call or have someone call for this film.

Q. Now, Mr. Clark, would you tell us whether or not spectroscopic film is an item stocked regularly by the Eastman Kodak Store? A. No, we do not stock it.

Q. In instances where you do not stock items is it your procedure to require deposits? A. That is correct. In case that the customer ordering (550) the film has no—or order—

Robert R. Clark, for Government—Direct.

ing the particular merchandise, has no charge account with us, if it be a cash transaction, we would require a deposit.

Q. Would you now examine Government's Exhibit No. 55 and explain the significance of the entry therein relating to E. R. Goldfus? A. Under date of November 24, the entry E. R. Goldfus, followed by the number 2233, indicates that our cashier received a \$20 deposit, which she assigned the number 2233, and entered in this book of miscellaneous payable items.

Q. And would you examine Government's Exhibit No. 56, and again explain the significance of that to E. R. Goldfus? A. This indicates that \$20 cash, under a miscellaneous payable slip, number 2233, in the name E. R. Goldfus, was typed up by the cash remittance clerk on November 25, 1952.

The Court: Was what?

The Witness: Typed.

The Court: Typed?

The Witness: Yes.

Q. Reverting back to the book—what is the number on the book? (551) A. Pages 66 and 67,—

Q. The exhibit number? A. The exhibit number is 55.

Q. Exhibit No. 55—would you refer to that again and tell the Court and jury whether the cash which was received in November was paid out at a subsequent date? A. This item remained unpaid until January 28, 1953, at which time the cashier paid \$20 out of her petty cash fund to apply against that deposit.

Q. Now, I ask you to examine Government's Exhibit No. 54, and explain that. A. This covers the cash sale of five rolls of 35 mm. by 100 feet spectroscopic film #649 GH. The transaction called for the payment of \$30.90, and the salesman received a \$20 deposit and the balance in cash from whoever accepted the merchandise.

(552) Q. Now, I call your attention to the fact that in the exhibit noted in the book, the cash was paid out on January 28th and on the Exhibit 54, which is the cash sale

Robert R. Clark, for Government—Direct.

slip, the date is January 29th. Could you explain that?
A. Yes.

Under our system we turn the cash register dates one day ahead around three o'clock in the afternoon of the day in which the cash is cleared.

That is, the cashier will clear the records or clear the register, turn the dating device one day ahead, so that anything—any cash coming in or cash sales made after the time that she turns her—changes her cash will bear a date subsequent to the actual date.

Q. One final question, Mr. Clark.

Have you caused a check to be made of your order file, the order file which is maintained by the Eastman Kodak store, to determine how many orders of spectroscopic film have been placed with the Eastman Kodak store since 1952?

Mr. Fraiman: Objection, your Honor.

The Court: Do you object to saying whether he has made a check?

Mr. Fraiman: No objection to that. I object (553) to the substance of the—

The Court: I don't think he has asked what you might find objectionable yet.

Mr. Fraiman: I am sorry. I withdraw the objection at this time.

The Court: Have you made a check?

The Witness: Yes. I have had a check made.

The Court: Don't answer the next question until counsel has an opportunity to object.

By Mr. Palermo:

Q. Would you tell the Court and jury what was discovered and disclosed by that check?

Mr. Fraiman: I object, your Honor.

The Court: Why?

Robert R. Clark, for Government—Cross.

Mr. Fraiman: On the ground it is not binding on the defendant as to how much film was sold by the Eastman Kodak store.

The Court: What harm is done?

Mr. Fraiman: Well, I don't—

The Court: Overruled.

Mr. Palermo: If your Honor please, the question was raised specifically by Mr. Donovan during the direct examination a week prior to this relating to this specific subject which the witness will now (554) testify.

By Mr. Palermo:

Q. Would you tell what was disclosed by that check?

A. There were no other orders calling for this specific film.

Q. For spectroscopic films? A. For spectroscopic film 35 by 100 millimeters, type 649 GH.

Q. From 1952? A. From 1952 through and up to the present time, or 1957.

Mr. Palermo: Thank you, Mr. Clark.

The Government has no further questions, your Honor.

The Court: Are you able to state whether such film could have been purchased elsewhere in the City of New York?

The Witness: Yes, your Honor. It could have been purchased through any authorized dealer of Eastman Kodak Company.

Cross examination by Mr. Fraiman:

Q. Mr. Clark, anybody that has the price to pay can purchase this spectroscopic film from Eastman Kodak or from any other store; is that not correct? (555) A. That is correct.

Q. Isn't it true, Mr. Clark, that actually this spectroscopic film is used primarily by people who are interested

Robert R. Clark, for Government—Cross.

in astronomy, the study of astronomy? A. I am not a technical man. I don't know just what the film is used for.

Q. You mentioned a specific number, a serial number I presume, or type of this spectroscopic film, did you not?

A. The order that we are referring to here called for spectroscopic film 649 GH.

Q. And it was that number that you checked to ascertain whether there were other— A. We checked all orders.

Q. For a particular—A. For a particular type of film, yes.

Q. Of spectroscopic film? A. No.

Q. Are there other types of spectroscopic film? There are, are there not? A. That's right.

Q. You did not check those other kinds? A. All the orders for film of this type are kept in the same files.

The files were all checked.

(556) Q. This is a particular sized film? A. That's right.

Q. I think you said 35— A. Right.

Q. —millimeters. Are there other sizes of this spectroscopic film? A. There are other emulsion numbers for spectroscopic film.

Q. Are there other sizes? A. I believe there are.

Q. Have you checked these other sizes, sir? A. All the orders. The order file was checked so that all spectroscopic film would have—orders for that particular film, spectroscopic, regardless of the size, would have been in that file.

Q. This was checked at your Eastman Kodak store? A. That was checked.

Q. That is the one store in which you are employed?

A. That is the only store we have in New York City outside of one at 20 East 45th Street in which records are—of this type—they would not handle this order and they would have no record of any such transaction.

Harry McMullen, for Government—Direct.

(558) HARRY McMULLEN, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

(Photographs were marked Government's Exhibits 57, 58 and 59 for identification.)

Direct examination by Mr. Tompkins:

Q. Mr. McMullen, where do you live? A. 321 Seventh Street, Brooklyn.

Q. By whom are you employed? A. Right now the Delroy Realty Corporation.

Q. How long have you worked for them? A. I have worked for them two years.

Q. For the last two years? A. Yes.

And I worked for the Waterman Realty for ten.

Q. What have your duties been in the last two years? A. Well, taking care of the building, running the elevator, everything in the building.

Q. How long have you been working in 252 Fulton Street, the building? A. Twelve years.

Q. Twelve years.

In other words, do I understand that there has (559) been a change in ownership? Is that it? A. That's right.

Q. Would you call yourself a building superintendent?

A. That is correct.

Q. Are you regularly around the premises? A. Every day.

Q. Do you know the tenants in the building? A. Yes, sir.

Q. During the period of time that you have been working at 252 Fulton, did you have a tenant by the name of Emil Goldfus? A. Yes, sir.

Q. Do you know him if you see him? A. Yes, sir.

Q. Do you see him here in court? A. Yes, sir.

Mr. Tompkins: Is there any question about the identification of the defendant as Emil Goldfus?

Harry McMullen, for Government—Direct.

Mr. Fraiman: Would you have him point him out, please?

By Mr. Tompkins:

Q. Will you point him out? A. Yes.

Mr. Tompkins: Will the defendant stand up so (560) there will not be—we want it to be positive.

(Whereupon the defendant stood at counsel table.)

Mr. Fraiman: No objection.

By Mr. Tompkins:

Q. Do you know what portion of the building—what premises—the defendant occupied, Mr. McMullen? A. That's right.

Q. Would you tell us? Will you describe it? Did it have a room number? A. He had a room on the fifth floor, 509—505.

Q. Room 505. Do you know when he rented the premises?

A. He rented the premises December the 17th, 1953. His rent started January 1, 1954.

Q. Did he continue to occupy Room 505 thereafter? A. That's right.

Q. Until what date? A. You mean until he left or—in 1955 he went away for a spell.

Q. Did he continue to occupy the premises up until September 1, 1957?

In other words, was the rent paid for the premises?

A. Yes, sir.

(561) Q. Were his belongings in there, as far as you know? A. That's right.

Q. Did he rent any other portion of the building, if you know? A. He rented a storage space, 509.

Q. When did he rent that? A. Sometime in 1955.

Q. Can you give us a rough estimate when in 1955? Was it in the spring, summer, fall, winter? A. I believe it was the spring.

Harry McMullen, for Government—Direct.

I can't say for sure.

Q. How long did he occupy the store room, 509? A. He had that up until he left on that last trip, to go on his vacation. That was—

Q. What year? A. April 26, 1957.

Q. I have here Government's Exhibit 57 for identification. I wonder if you would look at it and if you can identify it (counsel hands photograph to witness). A. (Witness examines photograph.)

Yes, I believe these two rooms—these two windows are the room, 505.

Q. Would you tell us what it is, what it represents? It is a picture of what? (562) A. That is the room at 252 Fulton Street, 505.

Q. Does it show the side of the building? A. That's right.

Q. With a pen would you just X in the two windows of that studio? A. (Witness writes on photograph.)

Mr. Tompkins: The Government would like to offer this at this time, your Honor.

Mr. Fraiman: I object to its admission, your Honor, on the ground it is completely immaterial.

It is a picture of two windows. I don't see how that is material.

The Court: I think they have been identified as windows in Room 505, haven't they?

Mr. Tompkins: That is correct, sir.

The Court: May I look at it?

(Mr. Tompkins hands photograph to the Court.)

The Court: The testimony is that the defendant occupied that room. I don't know why the picture showing the windows of the room is objectionable.

Mr. Fraiman: Just that—the picture itself, your Honor, is not really objectionable. It is just that I think it is immaterial and adds nothing to the record.

Harry McMullen, for Government—Direct.

(563) The Court: Objection overruled.

(Photograph heretofore marked Government's Exhibit 57 for identification was marked and received in evidence.)

By Mr. Tompkins:

Q. Mr. McMullen, I hand you Government's Exhibit 58, for identification.

(Counsel hands photograph to witness.)

Will you look at that picture and tell us what it represents? A. (Witness examines photograph.)

That represents the Ovington Studio, 252 Fulton Street.

Q. What portion of the building does it represent? A. It represents the front of the building.

Q. Does it show the front entrance? A. Yes.

Mr. Tompkins: I will offer it at this time.

Mr. Fraiman: Same objection, your Honor.

The Court: Same ruling.

(Photograph heretofore marked Government's Exhibit 58 for identification was marked and received in evidence.)

By Mr. Tompkins:

Q. I hand you Government's Exhibit 59 for identification. (564) Do you recognize it (counsel hands photograph to witness)? A. (Witness examines photograph.)

This is a side view of the building.

Q. I beg your pardon? A. Side and front view of the building.

Q. What building? A. Ovington Studios, 252 Fulton.

Mr. Tompkins: 252 Fulton.

I will offer it at this time, your Honor.

Harry McMullen, for Government—Direct.

Mr. Fraiman: Same objection, your Honor.

The Court: Same ruling.

(Photograph heretofore marked Government's Exhibit 59 for identification was received and marked in evidence.)

By Mr. Tompkins:

Q. Now, Mr. McMullen, were you on the premises of 252 Fulton Street during the year 1954? A. That's right.

Q. Did you see the defendant on the premises? A. That's right.

Q. How often did you see him? A. Occasionally, on and off I saw him, practically every day. On and off.

(565) Q. Did you know whether he conducted any business? A. No. I never saw anybody there.

Q. You never saw anybody there. What do you mean by that? A. He just painted.

Q. Did you ever discuss his business with him? A. No, sir.

Q. During the year 1955 were you present on the premises— A. That's right.

Q. —in the performance of your duties?

Did you see the defendant during that year? A. Well, I saw him part of the time,

Then he went away on a vacation.

Q. Do you recall when he went away on a vacation? A. I believe it was in the middle of 1955. Then he came back after five or six months—I am not so sure of the months—in the early part of 1956.

Q. In the year 1956 did you see him from time to time? A. Yes.

Q. Over the entire year, would you say? A. That's—well, from time to time.

(566) Q. Now, in 1957 you were present on the premises? A. That's right.

Q. Did you see him from time to time? A. Yes.

Harry McMullen, for Government—Direct.

Q. During the early part of this year.

Now, directing your attention to the rental payment—
Strike that.

Did he pay his rent to you on occasion? A. Practically all the time.

Q. How did he pay his rent? How did he pay it? Check or cash? A. He paid it in cash.

Q. Directing your attention to the April, 1957 payment, did he pay his rent in cash to you at that time? A. That is correct.

Q. Will you tell us about that particular payment? A. Well, he paid two months rent in advance.

Q. He paid two months rent in advance?

For what months? A. May and June.

Q. 1957.

Now, at that time did you have a conversation with the defendant, when he paid the rent? A. He said that he was going on his vacation, that he had (567) a sinus infection.

Q. I beg your pardon, I didn't get that. A. He said that he was going on his vacation and he had a sinus infection and he was going out of town. That's all he told me.

The Court: A sinus infection?

Mr. Tompkins: Sinus infection.

The Witness: Yes, sir.

By Mr. Tompkins:

Q. Do you recall how much he paid you? In other words, the two months in advance, how much— A. \$70.

Q. Did that include the store room that you say he subsequently rented? A. No. He dropped the storage space.

Q. Was it at that time that he dropped the store room? A. Yes, I believe so.

Q. May, 1957? A. Because the new party took and paid the rent for May.

Harry McMullen, for Government—Cross.

Q. What was the name of that new party, if you know?

A. Levine.

Q. Is Mr. Levine the present tenant of that store room?

(568) A. No. He gave it up.

Q. When did he give it up? A. I believe a couple of months ago back.

Q. From that time you had the conversation with the defendant when he said he was going away, when did you next see him? A. You mean the last time I saw him?

Q. From April, 1957 when he paid you the two months' rent? A. I never saw him no more.

Q. Until today, is that correct? A. That is correct.

Q. Did you at any time see any customers go into Mr.

— A. No, sir.

Mr. Tompkins: I don't have any more questions.
Cross-examine.

Cross examination by Mr. Fraiman:

Q. How much rent did Mr. Goldfus pay, Mr. McMullen?

A. At \$35 per month.

Q. \$35? A. That was for the studio.

Q. That was for the studio.

(569) How much was the other room that he rented?

A. The storage?

Q. The storage. A. Twenty.

Q. A total of \$55 a month? A. Yes.

Q. You have a number of tenants in your building? A. That's right.

Q. And the rents are all similar to that? A. They all vary.

Q. In that neighborhood? A. All different.

Q. You say that you had seen the defendant frequently in 1954, almost every day? A. On and off, yes.

Q. And similarly in 1955, aside from the time that he was away on his vacation? A. That's right.

Harry McMullen, for Government—Cross.

Q. And, as a matter of fact, right up to April, 1957, you saw him frequently? A. On and off, yes.

Q. Do you know other people in the neighborhood of 252 Fulton Street that also know the defendant? A. I couldn't say that I know them in the neighborhood. (570) no.

Q. Do you know Mr. Silverman? Don't you know him?

A. That's right. That was on the floor with him. That was a tenant with him on the floor.

Q. That is what I mean, A. You said the neighborhood.

Q. I am sorry. People in the building? A. That's right.

Q. You know a number of people in the building that also knew him? A. I mean that is on the floor?

Q. Yes, his neighbors. A. Yes.

Q. Have you ever had occasion to discuss the defendant's reputation with any of these people? A. You mean of late?

Q. At any time? A. No, not that I know of.

I mean that he was a tenant there, a good tenant.

Q. He was a good tenant? A. Yes.

The Court: I didn't hear him say that.

Mr. Fraiman: I thought he did, your Honor.

The Court: He said he was a tenant. He didn't (571) qualify it.

Mr. Fraiman: I am sorry, your Honor. I thought he had said he was a good tenant.

May we have the reporter read it, your Honor?

The Court: Oh, yes.

(Reco. is read.)

The Court: Sorry. I didn't hear the "good."

By Mr. Fraiman:

Q. Have you had occasion to discuss with people anything about Mr. Abel at any time? A. Not that I discussed, no.

James Bozart, for Government—Direct.

You mean that he was a tenant there? That's all I discussed.

Q. You never talked about anything else? A. Not that I know of.

Mr. Fraiman: I have no further questions.

Mr. Tompkins: That is all. No re-direct.

(Witness excused.)

(572) JAMES BOZART, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Maroney:

Q. Would you state your address, please? A. 4204 Avenue D, Brooklyn.

Q. How old are you? A. 17 and a half.

Q. Directing your attention to the summer of 1953, were you at that time a newspaper delivery boy? A. Yes, I was.

Q. And specifically directing your attention to an occasion in the summer of 1953, when you were making collections during your route or over your route, do you recall a specific incident at which time you were given fifty cents in change at 3403 Foster Avenue in Brooklyn? A. Yes, I do.

The Court: 3403?

Mr. Maroney: Foster Avenue, yes, sir.

By Mr. Maroney:

Q. Now, what was the change that you received on that occasion? A. A quarter and five nickels.

(573) Q. After receiving the change, would you tell us what happened? A. Well, I left the apartment door, and I was walking down the stairs. You see, it's in an apartment

James Bozart, for Government—Direct.

building. And the change slipped from my hand and it dropped on the staircase; and when I picked it up, one of the nickels was split in half.

Q. And you picked up the two pieces, did you? A. Yes, I did.

Q. Was there anything in either of the pieces? A. One of them—half of the nickel had a piece of microfilm in it.

Q. Did you look at the piece of microfilm? A. Yes, I did.

Q. Was there anything on it? A. Yes. It was a picture of a file card, or an index card.

Q. Could you state whether there was any writing or printing or anything on it? A. On the file card?

Q. On the microfilm. A. Yes. Oh, it had a picture of a file card and on the file card there seemed to be rows of numbers.

(Two photographs were marked Government's (574) Exhibit No. 60, for identification.)

By Mr. Maroney:

Q. I show you what has been marked as Government's Exhibit No. 60, for identification, and ask if you can recognize that photograph (counsel hands photographs to witness.)—or those two photographs? A. (Witness examines photographs.)

Yes, I can.

Q. What do those photographs represent? A. This is the nickel that I found.

Q. Are they photographs of that nickel that you found on that occasion in the summer of 1953? A. Yes. This is the nickel.

Q. Does one of those photographs or, rather, do these photographs also show the microfilm? A. Yes, they do.

Q. Now, you say that you picked up the nickel and you examined it.

James Bozart, for Government—Cross.

Now, did there come a time when you turned the nickel over to someone? A. Yes, I did.

Q. When was that in relation to your finding of the coin?

A. You mean how much later?

(575) Q. Yes. A. Oh, about two or three hours.

Q. The same day? A. Same day.

Q. And to whom did you turn the nickel over? A. To Detective Milley and an officer, Mr. Lewin.

Mr. Maroney: No further questions, your Honor.

Mr. Fraiman: Your Honor please, at this time I ask that the entire testimony of this witness be stricken on the ground that it is not in any way binding upon the defendant.

The Court: I will deny the motion with leave to renew.

Mr. Fraiman: Thank you.

Do I understand, your Honor, the testimony is admitted subject to connection, then, at some future time?

The Court: I have denied the motion to strike it, but reserved to you the right to renew if the testimony is not connected with the defendant.

Mr. Fraiman: Thank you, your Honor.

Mr. Maroney: With the defendant or with the conspiracy?

The Court: Or with the conspiracy, yes.

(576) Mr. Maroney: Any cross?

Mr. Fraiman: Yes.

Cross examination by Mr. Fraiman:

Q. Have you ever seen the defendant in this case, James?

A. No, I haven't, not other than newspaper pictures.

Q. Have you ever heard of him, other than in the newspapers? A. No, sir, I haven't.

Q. Have you ever seen or heard of a man named Reino Hayhanen? A. Yes, I have.

Frank Milley, for Government—Direct.

Q. In connection with this case, James? A. Just in connection with this case, yes.

Q. That is recently? A. Yes.

Q. In the last couple of weeks? Is that right? A. That's right.

Q. Prior to that time,—the time you found this nickel—you had never heard of Reino Hayhanen, had you? A. That is true.

(577) Q. Or a man named Eugene Maki? A. No, sir. I haven't.

Q. The only time you have ever seen him was when you were in the United States Attorney's Office. Is that the occasion when you saw him? A. No. I was in—last week I saw him.

Q. That was the first time that you saw him? A. That was the first time I saw him, yes.

Mr. Maroney: No re-direct, your Honor.

(Witness excused.)

(578) FRANK MILLEY, a witness called on behalf of the Government, having first been duly sworn, was examined and testified as follows:

Direct examination by Mr. Maroney:

Q. Would you state your occupation, please? A. I am a detective, New York City Police Department.

Q. Were you so employed in the summer of 1953? A. I was.

Q. Now, specifically directing your attention to that time, did you have occasion in the course of your official duties to go to the home of James Bozart— A. I did.

Q. —In Brooklyn? A. I did.

Q. Would you state what you did there? A. At James Bozart's home, I spoke to his father, Mr. Fulton Bozart. James was not at home at the time.

Frank Milley, for Government—Direct.

Q. During that evening did you see James Bozart?

A. I did.

Q. And did you receive anything from him? A. I did.

Q. Would you state what that was that you received?

A. A nickel, 1948 Jefferson nickel.

(579) Q. Did you examine the nickel at the time? A. I did.

Q. Was it an ordinary nickel or— A. No, it was not.

Q. Would you state why it was not an ordinary nickel?

A. It was hollow—two halves of the—two nickels.

Inside of the coin was a piece of microfilm about five-sixteenths of an inch square wrapped in tissue paper.

Q. I show you what has been marked as Government's Exhibit 60 for identification and ask if you can identify those two photographs?

(Counsel hands photographs to witness.)

(Witness examines photographs.)

A. Yes. That is a photograph of the nickel that I got from James Bozart.

Q. Those photographs also show the microfilm, is that correct? A. That is correct.

Q. Did you look at the microfilm? A. I did.

Q. At the time you received the message, did it have any writing on it or printing or typing? A. Numbers.

Q. Numbers. (580) Now, subsequently did you give the nickel to anyone? A. I did.

Q. And to whom? A. Mr. George O'Connor, an agent of the Federal Bureau of Investigation.

Q. When was it that you turned the nickel over to Mr. O'Connor in point of time of your having received it?

A. About two hours after I received it.

That would make it about nine-thirty or ten o'clock at night.

Q. And this was in the summer of 1953? A. That is correct. Latter part of June, 1953.

George J. O'Connor, Jr., for Government—Direct.

Mr. Maroney: No further questions.

Mr. Fraiman: At this time, your Honor, I renew my motion to strike the entire testimony of this witness on the ground that it is not binding on the defendant.

The Court: Same ruling.

Any cross?

Mr. Fraiman: I have no cross-examination.

(Witness excused.)

(581) GEORGE J. O'CONNOR, JR., a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Maroney:

Q. Mr. O'Connor, would you state your home address, please? A. 873 Newton Avenue, Baldwin, New York.

Q. And your present occupation? A. I am an attorney with the Department of Investigation of the City of New York.

Q. What was your occupation in the summer of 1953? A. Special Agent, the F. B. I.

Q. Directing your attention specifically to the period of June, 1953, did you at that time have occasion to meet with Detective Milley? A. Yes, sir, I did.

Q. Did you receive anything from Detective Milley on that occasion? A. One night in June of 1953 Detective Milley gave me a nickel which was a hollowed-out nickel and contained a microfilm, which microfilm contained a ciphered message.

Mr. Fraiman: Objection and move to strike the last part of the answer.

(582) The Court: Would you object if he said the film presented several figures?

George J. O'Connor, Jr., for Government—Direct.

Mr. Fraiman: I would not, your Honor.

The Court: Would that be correct?

The Witness: Yes, sir.

The Court: Substitute that.

The Witness: I—

Mr. Maroney: Just a moment.

The Witness: I beg your pardon.

(Envelope containing two small round boxes was marked Government's Exhibit No. 61, for identification.)

By Mr. Maroney:

Q. I show you an envelope which has been marked Government's Exhibit No. 61, for identification, containing two small round boxes.

(Counsel hands envelope to witness.)

I will ask you if you can identify the contents of those two boxes? A. (Witness examines envelope and contents.)

This is the microfilm that was contained within the nickel that Detective Milley gave me the night of—that night in June, 1953.

Q. That is in one box, is it? (583) A. That is in one box.

This is the nickel that Detective Milley turned over to me.

Q. Do you have with you, by any chance, a needle?
A. Yes, sir.

(Witness inserts needle in nickel.)

I have opened it.

Q. With the needle were you able to break the nickel apart? A. Yes.

Q. Now, sir, I show you Government's Exhibit No. 60, for identification, and ask you if you can identify that?

(Counsel hands photograph to witness.)

A. (Witness examines photograph.)

George J. O'Connor, Jr., for Government—Direct.

This is a photograph that I had caused to be made of the nickel when I returned to my headquarters office.

(Photograph was marked Government's Exhibit No. 62, for identification.)

By Mr. Maroney:

Q. I show you what has been marked as Government's Exhibit No. 62 for identification and ask you if you can identify that (counsel hands photograph to witness.) A. (Witness examines photograph.)

Yes, sir.

(584) This is a positive of the microfilm negative which I had the Bureau photographer develop and blow up into this proportion.

Q. Upon receiving the nickel you say you had a photographer blow up—a Bureau photographer—

The Court: By "blow up," you mean enlarge?

The Witness: Enlarge, yes, sir.

By Mr. Maroney:

Q. And do you know whether or not an effort was made by the F. B. I. to decipher the message contained in Government's Exhibit No. 62?

Mr. Fraiman: I object, your Honor.

The Court: Why wouldn't that be the natural thing for them to try to do? What is there objectionable about it?

Mr. Fraiman: If this man made an effort to decipher it, I have no objection.

However, if he didn't, I object.

The Court: Suppose you confine your question to him.

Did you try to decipher the message?

The Witness: I did not, sir.

Michael G. Leonard, for Government—Direct.

The Court: Did anybody else try in your presence?

(585) The Witness: Not in my presence.

By Mr. Maroney:

Q. Did you at any time in the course of your duties in the F. B. I. ever see a deciphered version of that message?

Mr. Fraiman: I object, your Honor, as being immaterial.

The Court: How would he know?

Mr. Maroney: I mean, the question to be to his knowledge, your Honor.

Mr. Fraiman: It would be hearsay.

The Court: How would he know if he saw a deciphered version of that message?

He wouldn't, would he? Any more than you or I.

Mr. Maroney: No further questions, your Honor.

Mr. Fraiman: At this time I move to strike this witness' testimony, your Honor, on the ground that it is not binding upon the defendant.

The Court: Same ruling.

That is to say, the motion is denied with leave to renew under the circumstances heretofore indicated.

(Witness excused.)

(586) MICHAEL G. LEONARD, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Maroney:

Q. Mr. Leonard, would you state your occupation, please? A. I am a Special Agent of the Federal Bureau of Investigation.

Michael G. Leonard, for Government—Direct.

(587) Q. Mr. Leonard, would you state where you were born? A. I was born in Russia.

Q. And how long did you reside in Russia? A. Well, until I was about ten years old.

Q. And did you then attend—or, would you state where you went from Russia? A. From Russia I went to China, Tsing Tao, China, where I lived for five years, where I attended a Russian school.

Q. Now, do you speak the Russian language? A. Yes.

Q. And in your schooling in Russia and in China was your schooling conducted in the Russian language? A. Yes, sir.

Q. Now, prior to your present employment as a special agent of the Federal Bureau of Investigation, will you state what your employment was? A. I was employed by the Federal Bureau of Investigation as translator for the Bureau, since 1941.

Q. From 1941 until what time? A. Until June of 1943, when I became a Special Agent of the Bureau.

Q. Since 1943 have you also acted as a translator from time to time? A. From time to time, yes, sir.

(588) Q. And in what language? A. The Russian language.

Q. Now, sir, have you read the testimony of Reino Hayhanen— A. Yes, sir.

Q. —given— A. Yes, sir.

Q. Just a moment. —given in this trial, concerning the description of how his code operated? A. Yes, I have.

Q. I show you Government's Exhibit No. 62 for identification and ask you if you can identify that. A. Yes, I can identify it.

Q. Now, using the code system as explained by Reino Hayhanen in his testimony here in court, have you applied that code to Government's Exhibit No. 62 for identification? A. Yes, I did.

Q. And have you been able to decipher it? A. Yes, I can decipher it, yes, sir.

Michael G. Leonard, for Government—Direct.

Q. And does it decipher into the Russian or into the English language? A. Into the Russian language. The message comes out in the Russian language.

(589) Q. I show you Government's Exhibit No. 63 for identification and ask you if you can identify that. A. Yes, I can.

Q. And would you state what it is without disclosing its contents? A. This is the final message in the Russian language which came out of the deciphering of the code.

Q. Now, sir, have you translated that message in Russian—A. —into English.

Q. —into the English language? A. Yes, I have translated this message from the Russian into English.

Q. I show you Government's Exhibit No. 64 for identification and ask you if you can identify that. A. Yes, I can identify it. This is the translation of the Russian message into English.

Q. Will you state whether you applied this code to the message in question before or after May 10, 1957? A. After.

Q. Do you recall about when it was? A. Some time let's say the latter part of September or July—July or September.

Q. Of this year? (590) A. Yes.

The Court: The latter part of September?

The Witness: September.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibits Nos. 60, 61, 62, 63 and 64 for identification.

May I amend the offer, your Honor, to exclude from the offer in Exhibit No. 64 for identification the phraseology contained within parentheses in paragraph 4?

The Court: Is that the comment or—

Mr. Maroney: That is right.

The Court: I read something—

Mr. Maroney: Yes, sir.

Michael G. Leonard, for Government—Direct.

The Court: You mean the words "meaning here unknown, literally musical exercises"?

Mr. Maroney: Correct.

The Court: Now, the jury, if they see this, might like to see this comment. It isn't offered as a translation obviously. I think that renders it less intelligible than if you offer the paper as it is.

Mr. Maroney: Very well, sir. I withdraw the amendment.

(591) Mr. Fraiman: Your Honor, we object to the receipt in evidence of Government's Exhibits Nos. 60, 61, 62, 63 and 64 for identification on the ground that they are in no way binding upon the defendant, and on the further ground that the contents of the message, which I believe is Government's Exhibit No. 64 for identification, in no way relate to the conspiracy charge in this indictment.

The Court: Do you think it so appears, or are you just stating flatly that it does not?

Mr. Fraiman: I think it so appears, your Honor. That is my opinion.

The Court: Perhaps I missed something. May I look at it again?

Mr. Fraiman: Yes, sir.

The Court: Perhaps it so appears to you. It does not so appear to me. I think it may well apply to the conspiracy that has been testified to.

Mr. Fraiman: Our other objection, your Honor, is on the ground that it is not binding on the defendant.

The Court: Well, I think it could be binding on the defendant as part of the conspiracy if it be the fact, and I think it is, that Hayhanen testified (592) that he was given an individual code. I think that is the testimony. I am trying to find it.

Mr. Maroney: Page 342, your Honor.

The Court: 342

Michael G. Leonard, for Government—Direct.

Mr. Maroney: Yes, sir.

The Court: Yes.

Objection overruled.

(The papers referred to, previously marked for identification, were received in evidence as Government's Exhibits Nos. 60, 61, 62, 63 and 64.)

Q. Mr. Leonard, I show you Government's Exhibit No. 64 in evidence and ask you if you will read that, please.
A. (Reading) "We congratulate you on a safe arrival. We confirm the receipt of your letter to the address V repeat V" and the reading of letter Number 1.

"For organization of cover, we gave instructions to transmit to you three thousand in local (currency). Consult with us prior to investing it in any kind of business, advising the character of this business.

"According to your request, we will transmit the formula for the preparation of soft film and news separately, together with (your) mother's letter.

"It is too early to send you the gammas"—

(593) The Court: That is gammas, G-A-M-M-A-S?

The Witness: That is right, your Honor.

The Court: Now read your comment so that the jury will hear it.

The Witness: The comment is, "meaning here unknown, literally musical exercises."

The Court: Well, gamma is a Greek letter, isn't it?

What is the relation between the Greek letter gamma and musical exercises?

Maybe I shouldn't ask the question, but I just don't understand it.

Mr. Maroney: I could not answer it, your Honor. I don't know.

John Jameson Millar, for Government—Direct.

The Court: Continue. You read your comment. Now read the message as you translated it.

The Witness (continuing to read):

"Encipher short letters, but the longer ones make with insertions. All the data about yourself, place of work, address, etc., must not be transmitted in one cipher message. Transmit insertions separately.

"The package was delivered to your wife personally. Everything is all right with the family. We (594) wish you success. Greetings from the comrades. Number 1, 3rd of December."

Mr. Maroney: No further questions, your Honor.

Mr. Fraiman: May we have just a moment, your Honor?

The Court: Yes.

Mr. Maroney: May I pass these among the jury, your Honor?

The Court: Yes.

(Exhibits handed to the jury.)

Mr. Fraiman: We have no cross examination, your Honor.

(Witness excused.)

(595) JOHN JAMESON MILLAR called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Maroney:

Q. Would you please state your occupation, Mr. Millar?

A. I am a Special Agent with the Federal Bureau of Investigation.

Q. Were you so employed on May 15, of this year? A. That is correct.

John Jameson Millar, for Government—Direct.

Q. In the course of your official duties on May 15, did you have occasion to go to Prospect Park? A. Yes, I did.

Q. Who accompanied you on that occasion? A. Three other special agents by the names of John H. Proctor, Jr., Edward J. Murphy, and James P. Kehoe.

Q. I show you, now, Government's Exhibit No. 5 and ask you to identify it if you can. A. Yes, I can.

Q. Is that the area you visited on May 15th of this year? A. Yes, it is.

Q. Do you know who took that photograph? (596) A. Yes, I do.

Q. Will you tell the Court and jury? A. I took it myself.

Q. Does that photograph accurately represent what it purports to show? A. Yes, it does.

Q. Prior to the time that you went to Prospect Park did you receive any information pertaining to the area pictured in that photograph? A. Yes, I did.

Q. What was that information?

Mr. Fraiman: I object, your Honor.

The Court: Sustained.

Why did you go there?

The Witness: Sir?

The Court: Why did you go there?

The Witness: We went there to check this particular—

The Court: In the performance of duties? Is that it?

The Witness: Yes.

The Court: All right.

Mr. Maroney: Your Honor, he has already so testified, that he went there—

(597) By Mr. Maroney:

Q. Were you looking for anything when you went there? A. Yes, we were.

Q. What was it?

John Jamieson Millar, for Government—Direct.

Mr. Fraiman: I object, your Honor, to what the witness was looking for.

The Court: I will allow it.

What were you looking for?

The Witness: We were looking for a particular drop area.

By Mr. Maroney:

Q. Did you find a drop in the area? A. Yes, we did.

Q. Would you point it out on Exhibit No. 5? A. Right over in this corner of the steps.

Q. Is there any mark there? A. Yes, there is.

Q. Is that an ink mark? A. Yes, it is.

Q. What did you then do? A. We found that this particular spot on the stairway had been filled with cement, which we proceeded to chisel out.

(598) Q. And then did you find anything? A. Yes, we did.

By Mr. Palermo:

Q. Now I show you Government's Exhibit No. 65 for identification and ask you to identify it if you are able to.
A. Yes, I can identify this.

This is the particular screw that we located in this particular drop area.

Q. How can you tell that this is the particular screw?

Mr. Fraiman: I object, your Honor.

The Court: Why?

Mr. Fraiman: He has testified that it is a screw—

The Court: He can be asked how he can tell, of course.

A. This particular screw, at the time it was located, had initials put on it by James P. Kehoe, which are presently on the screw at this moment.

John Jameson Millar, for Government—Direct.

Q. I now show you Government's Exhibit No. 66 for identification and ask you to identify it if you are able to.

A. Yes. This particular photograph is a reproduction (599) of the particular area in which we found the screw.

Q. Do you know who took that picture? A. Yes, sir, I do.

Q. Who took it? A. I took that photograph.

Q. Does it accurately portray what it represents?

A. Yes, it does.

Q. After you found the screw what did you then do?

A. After finding the screw, why, we took a photograph of this particular drop area and then, upon completion of that fact we re-cemented the particular drop area, and then the screw was taken back to the F. B. I. office in New York City.

Q. Do you know whether the screw was then forwarded to the F. B. I. laboratory? A. Yes, it was, at that point.

Mr. Palermo: At this time, your Honor, we withhold the offer of Government's Exhibit No. 65 for identification, and we offer Government's Exhibit No. 66 for identification in evidence.

Q. Mr. Millar, was it your testimony that this screw—

The Court: Just a minute, please.

Do I understand that you are offering 66 but not (600) 65? Is that it?

Mr. Palermo: That is correct, your Honor.

The Court: Let us see if there is an objection with 66.

Mr. Fraiman: Might I ask the witness one question with respect to this photograph, your Honor?

The Court: On the *voir dire*?

Mr. Fraiman: Yes, your Honor.

The Court: All right.

Mr. Fraiman: Mr. Millar, there is a white object at approximately the center of this photograph—

John Jameson Millar, for Government—Direct.

The Court: I think that is not on the *voir dire*. You may ask him anything concerning the taking of the photograph, but now you are asking him to interpret it. That comes on cross.

Mr. Fraiman: My question, your Honor, would be, whether that white object was there when he came to the spot or whether it was placed there by one of the agents.

The Court: All right.

The Witness: Yes, this particular white object that you refer to was a piece of paper that was placed on the cement by myself and then at that point the screw was placed on top of it only to offer a (601) contrast for photographic purposes.

Mr. Fraiman: I object to the receipt of the photograph in evidence.

The Court: Why?

Mr. Fraiman: On the ground that it is a photograph taken of an area that was arranged by the F. B. I., and was not in its natural state at the time the photograph was taken.

The Court: What do you mean by "arranged by the F. B. I."?

Mr. Fraiman: That the—

The Court: That the piece of paper was put there with the screw?

Mr. Fraiman: Yes, your Honor.

The Court: Overruled.

(Government's Exhibit No. 66 for identification was received in evidence and so marked.)

Frederick E. Webb, for Government—Direct.

(603) **FREDERICK E. WEBB**, recalled, having previously been sworn, further testified as follows:

Direct examination by Mr. Maroney:

Q. Mr. Webb, I show you what has been marked as Government's Exhibit No. 65 for identification and ask you if you can identify that. A. Yes, sir. This was received in the laboratory for examination.

Q. Mr. Webb, I show you what has been marked as Government's Exhibit No. 67 for identification and ask you if you can identify that. A. Yes, sir. Government's Exhibit No. 67 for identification was also examined in the laboratory.

Q. Now, at the time you examined at the F. B. I. laboratory in Washington Government's Exhibit No. 65 for identification, will you state where Government's Exhibit No. 67 for identification was located with relation to Government's Exhibit No. 65 for identification? A. Government's Exhibit No. 67 for identification, which is a thin piece of paper was rolled up and was inside Government's Exhibit No. 65 for identification.

(604) Government's Exhibit No. 65 for identification comes apart, one section being threaded to fit the other, and Exhibit No. 67 for identification was rolled up and was down inside the larger portion of Government's Exhibit No. 65 for identification.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit No. 65 for identification, and Government's Exhibit No. 67 for identification.

Mr. Fraiman: I object, your Honor, on the ground that neither exhibit is binding on the defendant.

The Court: You heard the testimony with regard to this drop, didn't you?

Mr. Fraiman: Yes, your Honor, but the witness Hayhanen did not testify that he placed any such—

Frederick E. Webb, for Government—Direct.

The Court: He testified that the drop was used.

Mr. Fraiman: Yes, he did, your Honor.

The Court: Objection overruled.

Q. Mr. Webb, showing you again Government's Exhibit No. 67 in evidence, would you read the message that was contained in the bolt? A. Government's Exhibit No. 67 reads:

"Nobody came to meeting either 8th or 9th at 203", and the second line, "2030 as I was advised he (605) should. Why? Should he be inside or outside? Is time wrong? Place seems right. Please check."

Q. Now, Mr. Webb, I show you Government's Exhibit No. 52 in evidence and ask you if you have seen that?

A. Yes, sir. This is a typewriter which I examined—

Q. At the F. B. I. Laboratory? A. Yes, sir.

Q. And did you make samples from that typewriter?

A. Yes, I did.

Q. Have you brought those samples with you? A. Yes, I have.

Here they are (producing papers.)

Mr. Maroney: Will you mark these for identification?

(The papers were marked Government's Exhibit No. 68 for identification.)

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit No. 68 for identification.

The Court: Is Exhibit No. 68 the pages of samples?

Mr. Maroney: Yes, sir.

Q. Do we understand correctly, Mr. Webb, that each of the pages which have been marked Government's Exhibit

Frederick E. Webb, for Government—Direct.

(606) No. 68 for identification were made as samples taken from this typewriter? A. Yes, sir.

Q. Government's Exhibit No. 52 in evidence? A. Yes, sir.

Each page here is a sample, in different wording, made from this typewriter, which is a Remington portable typewriter, number N1128064, and each sample has that serial number marked on it.

Mr. Fraiman: Your Honor, Government's Exhibit No. 68 for identification concerns a large number of different messages or paragraphs of material that is perfectly readable, and if the material is already in evidence, I have no objection to it. However, if the material itself is not in evidence, I would object to it.

I know that some of the material here is in evidence, but I don't know about the rest of it.

The Court: I think the purpose of this offer is to show how this machine writes.

Mr. Fraiman: Yes, your Honor.

The Court: I think that that is the purpose. I don't think there is any offer as to the contents of any of the sheets of paper.

(607) Mr. Maroney: That is correct, sir.

The Court: I think it is merely a question of the performance of the typewriter as a typewriting machine.

Mr. Fraiman: Yes, your Honor, I understand that, but I wonder if your Honor would look at it.

The Court: No, I would rather not. What difference does it make?

Mr. Fraiman: The first page has different letters typed on it, capital and small letters, numbers, et cetera.

Then the pages after that have certain copies of letters and things of that sort.

Frederick E. Webb, for Government—Direct.

The Court: Very good.

Mr. Fraiman: That is, of messages.

The Court: Very good.

This is merely an indication of how this machine performs its function—how it makes letters—isn't that it?

Mr. Maroney: That is correct, sir. That is the sole purpose of the offer.

The Court: Now, it may have been the Declaration of Independence there. That wouldn't change the nature of the document as a matter of evidence.

(608) Mr. Fraiman: Yes, your Honor, but I wouldn't mind, of course, if it had something like the Declaration of Independence, but some of these things relate to the case.

There are statements here that relate to the case. That is what I object to.

The Court: Well, I think that Government counsel will stipulate that he is not offering this as to contents in the sense of the reading matter. He is merely offering this to show how the machine functions as a typewriter.

Mr. Maroney: That is correct, sir.

Mr. Fraiman: In view of that, your Honor, we have no objection.

(The exhibit was thereupon received in evidence as Government's Exhibit No. 68.)

(609) Q. Now, Mr. Webb, this morning I believe you identified the typewriter sitting right here, Exhibit No. 52 in evidence, and identified Exhibit No. 68 in evidence as being samples taken from that typewriter; is that correct?
A. Yes, sir, it is.

The Court: Just a minute. Have we gone as far as that? Oh, yes, you are right.

Frederick E. Webb, for Government—Direct.

By Mr. Maroney:

Q. Now, Mr. Webb, I show you Government's Exhibits 28 and 29 in evidence, and ask if you have examined those documents?

(Counsel hands documents to witness.)

A. (Witness examines documents.)

Yes, sir. I have examined Exhibits 28 and 29.

Q. Have you examined those previously from the standpoint of the typewriting appearing on those documents?

A. Yes, sir. That's the examination that I made of (610) them.

Q. I also show you Government's Exhibit No. 51 in evidence, and ask if you have previously examined the typewriting appearing on that exhibit?

(Counsel hands document to witness.)

A. (Witness examines document.)

Yes, sir, I have examined the typewriting on this exhibit, Exhibit No. 51 for identification.

I am sorry, it is Exhibit No. 51.

Q. And have you previously examined the typewriting appearing on Government's Exhibit No. 67 in evidence, being the message that was found in the bolt that was taken from the— A. Yes, sir. I also examined the typewriting on this exhibit, Exhibit No. 67.

Mr. Maroney: So that the jury will understand what exhibits are being referred to, might I explain them?

The Court: State in the record what they are.

Mr. Maroney: Exhibit No. 51 is the letter addressed to Mr. Ernest Tribelhorn by E. R. Goldfus, dated September 14, 1953.

I think Mr. Tribelhorn stated that to the best of his knowledge the signature was that of the defendant. (611) ant.

Frederick E. Webb, for Government—Direct.

The Court: However, he stated that it was not written in his presence.

Mr. Maroney: That is correct, sir.

And Exhibits 28 and 29 are two typewritten pamphlets, one entitled "Use of Vacuum Board for making matrices" and the second entitled, "Color Photography, Separation Negatives," which the witness, Reino Hayhanen, testified, if I recall correctly, he received from the defendant.

By Mr. Maroney:

Q. Now, Mr. Webb, did you compare the typing on Government's Exhibits-No. 28, 29, 51, and 67 with the typing appearing in the samples taken from the typewriter, Government's Exhibit No. 52; the samples being Government's Exhibit 68 in evidence? A. Yes, I did.

Q. Now, as a result of the comparison made by you as to the typewriting appearing in those various documents, do you have an opinion as a result of your comparison? A. Yes, I do.

Q. Did you have photographic enlargements of the exhibits that I have just referred to made for demonstration purposes? (612) A. Yes, sir. I have some photographic enlargements of certain parts of exhibits.

I don't—I did not prepare enlargements of all of the exhibits, but certain parts of them I did.

Q. As to Exhibits Nos. 67 and 51, being the message and the letter addressed to Mr. Tribelhorn, did you prepare enlargements of the entire contents of those two documents? A. Yes, sir. Of those two, that is right.

Q. And as to Government's Exhibits 28, 29, and 68, did you prepare photographic enlargements of portions of those documents? A. That is correct, yes, sir.

Q. And are those photographic enlargements of the exhibits true and faithful reproductions of the portions of the original exhibits which they represent? A. They are.

Frederick E. Webb, for Government—Direct.

Q. Now, on any of the reproductions, the enlargements that you have caused to be made, have you placed any additional marks on such enlargements? A. I have placed some red arrows on one part of the samples—that is the enlargements of some of the samples that I took from the type-writer; yes, sir.

I haven't placed any markings on the others.

(613) Q. Have you also caused to be made photographic enlargements of the bolt which you identified this morning as having been examined in the Bureau Laboratory, Government's Exhibit No. 65? A. Yes, sir, I have an enlargement which shows how the bolt works and also shows the contents of the bolt.

The Court: That bolt is Exhibit No.—

Mr. Maroney: 65, I think, your Honor.

The Court: 65.

I think in the testimony it is described as a screw, not a bolt.

Mr. Maroney: A screw. I think that is correct, sir.

By Mr. Maroney:

Q. Is that what you referred to Mr. Webb, a screw? A. It's—Yes, sir. The exhibit I looked at before lunch, I don't know how ⁽³⁾ was referred to here, but we referred to it as an eye bolt,—part of an eye bolt.

Mr. Maroney: May we have these charts marked, your Honor, and set up so that the jury can see them?

The Court: Do you wish to give them an A letter?

Mr. Maroney: Yes, sir.

The first chart—

By Mr. Maroney:

(614) Q. Is this group samples, Mr. Webb (indicating)? A. Yes, sir, these are all samples.

Frederick E. Webb, for Government—Direct.

The Court: Are these 28-A, 29-A, 51-A, and 67-A respectively?

The Clerk: 68-A to H.

The Court: These are 68?

The Clerk: That is what they asked to mark them, your Honor.

(Samples were marked Government's Exhibit No. 68-A to H, inclusive, for identification.)

Mr. Maroney: These are the samples, your Honor.

The Court: I suggested that each sample be given an A letter in connection with the original exhibit number. I thought that would be simpler, but do it your way.

Mr. Maroney: Your Honor, the original exhibit is 68. All the samples are contained in Exhibit No. 68, and these are various pages from that Exhibit No. 68.

The Court: But that doesn't associate each illustration with the original exhibit.

I think that it would simplify matters if you associated each of these enlargements with the exhibit to which it refers, that's all. It doesn't make that (615) much difference to me.

Mr. Maroney: It refers to Exhibit No. 68, your Honor. All these refer to Exhibit No. 68.

The Court: Do it your way.

Mr. Maroney: This is 28-A.

(Government's Exhibit No. 28-A, B, and C, marked for identification.)

Mr. Maroney: 29-A.

(Government's Exhibit No. 29-A, and 29-B, marked for identification.)

The Court: Is there an Exhibit No. 67-A?

Mr. Maroney: Yes, sir, there is. 67-A.

Frederick E. Webb, for Government—Direct.

(Government's Exhibit No. 67-A was marked for identification.)

(Government's Exhibit No. 65-A was marked for identification.)

(Government's Exhibit No. 51-A was marked for identification.)

Mr. Maroney: At this time, if your Honor please, we offer in evidence Exhibits 65-A, 67-A, 28-A, 28-B, 28-C, 29-A, 29-B, 51-A and Exhibits 68-A through H, for identification.

The Court: A through H, is that?

Mr. Maroney: Yes, sir.

(616) The Court: As in "heavy"?

Mr. Maroney: Yes, sir.

Mr. Fraiman: No objection, your Honor.

The Court: No objection?

(Exhibits heretofore marked Government's Exhibits Nos. 65-A, 67-A, 28-A, 28-B, 28-C, 29-A, 29-B, 51-A, and 68-A through H, inclusive, for identification, were marked and received in evidence.)

Mr. Maroney: May Mr. Webb step down, your Honor?

The Court: Please.

Mr. Fraiman: Your Honor, I wonder if I might comment with reference to these that we still have our objection to the original exhibits?

We have no objection to these as blow-ups.

The Court: That is understood. You think the reproductions are no worse than the originals?

Mr. Fraiman: Yes, sir.

(Whereupon the witness left the witness stand and assumed a position near an improvised easel.)

(617) The Witness: The enlargement on the top, on the right hand side—on your left—marked Exhibit

Frederick E. Webb, for Government—Direct.

No. 65, is an enlargement showing the—65-A—is an enlargement showing the bolt or the screw, which is Exhibit No. 65.

In the top left part it shows the bolt as it was originally received.

In this enlargement (indicating), there can be seen a separation here to the right—

The Court: By "here," you mean what?

The Witness: Sir?

The Court: What do you mean by the word "here"? A separation where?

The Witness: About a third of the way from the end of the bolt.

The Court: On the shaft, so to speak?

The Witness: Well, it is on the threaded portion.

The Court: On the threaded portion?

The Witness: About a third of the way up on the threaded portion from the end.

The enlargement to the—in this same exhibit No. 65-A—to the right at the top shows the two parts of the bolt separated.

(618) On the small end part, the threads can be seen and between them the little piece of rolled paper that was removed from the larger section of the bolt, which is to the left here, and which does have a cavity in it or it is a container for the little rolled piece of paper.

At the bottom of this enlargement is an enlargement of the note, that is, the typewritten note, removed from this exhibit, Exhibit No. 65.

The Court: And the typewritten note is Exhibit 67, isn't it?

The Witness: The typewritten note, yes, sir, is Exhibit 67.

On the chart just beneath this one, I have an enlargement of the same note but enlarged to still a little greater extent.

Frederick E. Webb, for Government—Direct.

This is Exhibit No. 67-A,—this photographic enlargement, 67-A, which is the enlargement of Exhibit 67.

This particular enlargement was made for purposes of showing the typewriting comparison of the note with samples made on the typewriter, the samples being Exhibit No. 68 and to the right, on top, the enlargement on top is an enlargement of one of the (619) samples made in more or less alphabetical order, including capital letters and small letters.

(626) Then, on the basis of this comparison of characteristics, I reached the conclusion that this Exhibit 67 was prepared on the same typewriter from which Exhibit 68 was prepared, which is the typewriter that I previously identified here.

(628) The Court: Did you come to a conclusion as to a similarity of execution?

The Witness: Yes, sir.

I reached the conclusion that this same typewriter was used to prepare Exhibit 28, the typewriter, known standards of which are Exhibit 68.

(630) . . . I also reached the conclusion that the same typewriter prepared this exhibit [Exhibit 29], which is the typewriting known exhibits of which are marked Government's Exhibit No. 68.

(631) . . . I reached the conclusion that this document, Exhibit No. 51, was also prepared on the same typewriter, known Exhibits marked 68, Government's Exhibit No. 68.

Samuel F. Groopman, for Government—Direct.

(632) Q. The typewriter you have been referring to, Mr. Webb, is Government's Exhibit No. 52. Is that correct?
A. Yes, sir, that is correct. Exhibit No. 52.

(633) SAMUEL F. GROOPMAN, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Palermo:

Q. Will you please state your profession? A. I am a medical doctor.

Q. And where do you have offices, Dr. Groopman? A. 4 East 28th Street, New York City.

Q. What is 4 East 28th Street? A. Well, it is a hotel.

Q. What is the name of the hotel? A. Latham.

Q. The Latham Hotel? A. Yes, sir.

Q. Dr. Groopman, I am going to ask you to identify the defendant in this case if you can. Do you recognize the defendant? A. Yes, I do.

Q. Under what name do you recognize the defendant?
A. Martin Collins.

The Court: Martin—

Mr. Palermo: Martin Collins, your Honor.

The Witness: Collins.

(634) The Court: Collins?

Mr. Palermo: Yes, sir.

Would the defendant please stand so that Dr. Groopman could identify him?

(The defendant complied.)

Q. Is this the man you know as Martin Collins? A. Yes, that is the man, sir.

Forrest S. Putnam, for Government—Direct.

Q. Under what circumstances did you meet Martin Collins, Doctor? A. Well, he came into the office to be vaccinated. He was leaving the country.

The Court: Can you tell us about when, please?

The Witness: Yes, sir. I will have to refer to my records.

(Witness refers to paper.)

He came in on the 21st of May, 1957.

The Court: May 21, 1957?

The Witness: Yes, sir.

Q. Did you so vaccinate him, Dr. Groopman? A. Yes, I did.

Q. At that time did you have any conversation with the defendant concerning foreign travel? A. Yes, sir, I did. I asked him where he was going.

Q. And what did he say? (635) A. He said he was going to the north countries to paint.

FORREST S. PUTNAM, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Featherstone:

Q. Mr. Putnam, would you tell the Court and jury by whom you are employed? A. As a Special Agent for the Federal Bureau of Investigation.

Q. How long have you been with the F. B. I.? A. Seven years.

(636) Q. Were you so employed on May 21, 1957? A. Yes, sir.

Q. Did you, on May 21, 1957, in the course of performing your official duties, have occasion to go to Brand's Bar in Brooklyn? A. Yes, sir.

Forrest S. Putnam, for Government—Direct.

Q. Where is Brand's Bar located? A. 58th Street and Fourth Avenue, Brooklyn, New York.

Q. Why did you go to Brand's Bar? A. For the purpose of visually observing a signal area utilized by Haynen and Asko.

Q. What did you do when you arrived at Brand's Bar? A. I went into Brand's Bar and proceeded to the men's room, and observed the area on top of a partition between the general area and the stall area in the men's room.

Located on the top of the partition I noticed a thumb tack and a small piece of paper. I took the piece of paper and returned to our New York office.

Q. I show you what has been marked as Government's Exhibit No. 34 for identification and ask you if this is the object you found in the men's room of Brand's Bar. A. Yes, sir.

Q. Whose initials appear on the back of that piece of paper? A. My initials.

(637) Q. After you picked this up you returned to the F. B. I. office? Is that correct? A. That is right, sir.

Mr. Featherstone: The Government would like to offer Government's Exhibit No. 34 for identification in evidence.

(638) Mr. Fraiman: I object to the admission, your Honor, of Exhibit No. 34 in evidence. It is not binding—

The Court: Well, you realize that so much of the witness' answer as identified the paper in being and asked for his handwriting is permitted to stand?

Mr. Fraiman: Yes, your Honor.

The Court: The defense's objection to the contents of the paper was sustained.

Mr. Fraiman: Yes, sir.

The Court: Now it is offered under the testimony of this witness as to where he found it, and I think the testimony means that he found it in a drop area.

Walter H. Anderson, for Government—Direct.

Mr. Fraiman: Our objection is that it is not binding on the defendant.

The Court: That is on the same theory that you think a conspiracy has not been proven.

Mr. Fraiman: Yes, your Honor.

The Court: Objection overruled.

I am not meaning to indicate that I think that the conspiracy has been proven, members of the jury. I am simply saying that I am overruling the objection.

(639) Mr. Featherstone: No further questions.

Mr. Fraiman: I have no cross examination, your Honor.

(Witness excused.)

WALTER H. ANDERSON, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Featherstone:

Q. Will you tell the Court and jury by whom you are employed, Mr. Anderson? A. Department of State, Chief, Division of Records Management, Office of General Services.

Q. Have you custody of the records of the Department of State which indicate the identities of those who have given to the Secretary of State notification that they are acting as agents of a foreign government? A. Yes, sir.

Q. Have you checked those records to ascertain whether Radolf Ivanovitch Abel ever filed such a notification? A. Yes, sir.

Q. What was the result of your search? (640) A. There was no record, sir.

Q. Have you caused a search to be conducted to ascertain whether Emil R. Goldfus ever filed a notification with the Secretary of State? A. Yes, sir.

Roy A. Rhodes, for Government—Direct.

Q. What was the result of that search? A. No record, sir.

Q. Have you conducted a similar search to ascertain whether Martin Collins ever filed such a notification? A. Yes, sir.

Q. And what was the result of your search? A. The same. No record, sir.

Q. Have you conducted a search of your records to ascertain whether Reino Hayhanen ever filed such a notification with the Secretary of State? A. Yes, sir.

Q. What was the result of your search? A. No record, sir.

Q. Have you conducted a search of your records to ascertain whether Eugene N. Maki ever filed such a notification with the Secretary of State? A. Yes, sir.

Q. What was the result of your search? (641) A. No record, sir.

Mr. Featherstone: No further questions.

(Witness excused.)

Mr. Tompkins: The prosecution is going to call Roy A. Rhodes, your Honor—Sergeant Rhodes.

(642) ROY A. RHODES, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Mr. Donovan: May it please the Court, before the questioning of this witness commences, may counsel approach the bench?

The Court: Surely.

(The following discussion was had at the bench, not within the hearing of the jury:)

Mr. Donovan: Before the direct examination of this witness commences we wish to make a demand

Roy A. Rhodes, for Government—Direct.

that an offer of proof be made, and I would like Mr. Fraiman to state the specific reasons—

The Court: Why?

Mr. Fraiman: Our basis for requesting the offer of proof is that—

The Court: No; why have you the right to demand an offer of proof?

Mr. Fraiman: We are not demanding an offer of proof.

The Court: That is what Mr. Donovan says—he is making a demand for an offer of proof.

Mr. Donovan: A demand for an offer of proof.

The Court: On the part of the prosecution.

(643) I am asking you why. I never heard of it before, but there are lots of things I haven't heard of.

Mr. Fraiman: It is a request for an offer of proof.

The Court: Why?

Mr. Fraiman: We request the offer of proof.

The Court: Why?

Mr. Fraiman: On the ground that on the basis of the record as it now stands this witness has not been connected in any way with the conspiracy, and we feel that if his testimony is permitted to be given before the jury and it is then found to be inadmissible, that the testimony will be of such a highly prejudicial nature that the defendant will be irreparably damaged by his testimony.

The Court: When that condition arises you will have to take legal advantage as your judgment dictates. I am not going to direct United States counsel to make an offer of proof when he calls a witness, of course, I am denying your request.

Mr. Donovan: Very well, your Honor.

(Trial resumed before the jury.)

Roy A. Rhodes, for Government—Direct.

(644) *Direct examination by Mr. Tompkins:*

Q. Sergeant, your full name is Roy A. Rhodes? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. You are a member of the Armed Forces of the United States? A. I am, sir.

Q. What branch? A. Signal Corps, sir.

Q. And what is your rank? A. Master Sergeant, sir.

Q. Master sergeant? A. Yes, sir.

Q. And how long have been a member of the Armed Forces? A. A little over fifteen years.

Q. And you are presently assigned to what post? A. Fort Myer, Virginia.

The Court: Fort Myer, Virginia?

The Witness: Fort Myer, Virginia, yes, sir.

Q. Is that a duty post or a permanent post? A. That is a duty post.

(645) Q. And where is your permanent post? A. Fort Huachuca, Arizona.

The Court: Now, the difference between your assignment to Fort Myer and this second-named place is what, please?

The Witness: Fort Myer is my duty station. My permanent station, my home station, is Fort Huachuca.

The Court: Thank you.

Q. Sergeant, in what year were you born, sir? A. 1917, sir, March 11th.

Q. Where were you born? A. Royalton, Oklahoma.

Q. What is the name of your father? A. W. A. Rhodes.

Q. And where did your father live in 1955? A. Salida, Colorado—Howard, actually.

Q. Do you have any sisters? A. Yes, sir, I have three sisters.

Roy A. Rhodes, for Government—Direct.

Q. Would you give us their names? A. Arlene Brown, Imogene Rundell, and Nellie May Barnes.

Q. Where did Arlene Brown live in 1955? A. Howard, Colorado.

Q. Do you know where she lives now? A. Radium, Colorado.

(646) Q. Now, do you have any brothers, Sergeant? A. I have one brother—Franklin S. Rhodes.

Q. Did your father, if you know, have a brother-in-law? A. He has a brother-in-law, yes, sir.

Q. Where does he live? A. I believe he lives in Oklahoma City, sir.

The Court: Do you want to be a little bit more specific?

The Witness: I could not give you the address, sir.

The Court: I am asking Mr. Tompkins.

By brother-in-law do you mean the husband of the father's sister?

Mr. Tompkins: It would be—let me see—either Mr. Rhodes had married—wait a minute.

Well, either Mr. Rhodes—

The Court: Well, why not ask him?

Mr. Tompkins: (Addressing the witness.) All right, explain it.

The Witness: Well, I understood you to refer to a brother-in-law, so he only has one sister, married sister.

Q. And this man is married to your father's sister?

(647) Is that it? A. Yes, sir.

Q. So he would be your uncle? A. That is right.

Q. Now, do you have any brothers? A. Yes, sir. One.

Q. Where does he live? A. Who?

Q. Your brother. Do you have any brothers, I said.

A. Yes, sir. One brother. He lives in Colorado Springs.

Q. Where did he live in 1955? A. In Springfield, Colorado.

Roy A. Rhodes, for Government—Direct.

Q. Now, during the course of your military service, Sergeant, were you assigned to duty in the Soviet Union?

A. I was.

Q. And what date did you arrive in the Soviet Union?

A. May 22, 1951.

The Court: May 22, 1951?

The Witness: Yes, sir.

Q. In what part of the Soviet Union? What city? A. Moscow.

Q. And was your period of duty confined to services in Moscow? (647-A) A. It was in the American Embassy.

Q. Now, how long were you assigned to Moscow? A. I left there the last of June of 1953. Just a little over two years.

(648) Q. Now, following your duty in Moscow where were you assigned? A. San Luis Obispo, California.

Q. Now, when you received your new assignment did you receive orders? A. I did, yes, sir.

Q. I have here Government's Exhibit No. 69 for identification, Sergeant. Can you identify that? Those orders?

A. Yes, sir. Those are the orders I came home on.

Q. From Moscow? A. From Moscow.

Q. In 1953? A. In 1953.

The Court: Those are the orders—

Mr. Tompkins: —those are the orders he came home on from Moscow in 1953.

Q. In other words, they transferred you to your next assignment? A. Yes, sir.

Mr. Tompkins: I would like to offer this in evidence.

Mr. Donovan: That is objected to, your Honor, on the ground that it is immaterial and not binding (649) on the defendant.

The Court: I don't think it is offered as binding on the defendant. I doubt if that is the Gov-

Roy A. Rhodes, for Government—Direct.

ernment's theory. But it corroborates the witness' statement that he was transferred.

Mr. Tompkins: That is exactly right, your Honor. And to where he was transferred.

The Court: Yes.

Overruled.

Q. Now, during this period that you were stationed in Moscow, Sergeant, were your family present with you? A. They were.

Q. Did they go to Moscow with you or did they come after? A. They came after.

Q. Do you recall approximately the time that they arrived in Moscow? A. I believe it was around the 20th of February of 1952.

Q. Now, did you make an application to the Embassy to have your family join you? A. I did.

Q. And following that application were you advised that your application had been approved? A. I was.

(650) Q. Do you recall approximately when that was, the date that you were so advised? A. This was in December of 1951.

Q. Now, during the time that you were assigned to Moscow, in the Soviet Union, what were your duties? A. I was Motor Sergeant for the Embassy.

Q. Could you describe to the Court and to the jury generally the location of the Embassy as relates to the garage of the Embassy—just the physical location? A. The physical location—the garage that the Russians had assigned to the American Embassy for the maintenance of the fleet of cars in that Embassy, maintained by it, was approximately one and a half miles away from the physical location of the Embassy.

Q. When you first arrived in Moscow, where did you live? A. In the Embassy. I lived in the Embassy all the time I was in Moscow.

Q. You lived in the Embassy all the time? A. Yes.

Roy A. Rhodes, for Government—Direct.

Q. Now, to whom were you assigned in the Embassy?
A. Actually to the State Department.

Q. Would it be that you were assigned to the military attache? (651) A. My orders and my trip, and so forth, were issued by the Army, but in actuality I worked for the State Department there.

Q. Now, I just want to go ahead on your station for a minute. A. Yes.

Q. You testified that you went from Moscow, ^{U.S.S.R.} in the Soviet Union, to San Luis Obispo, in California? A. I did, yes, sir.

Q. How long were you stationed there? A. At San Luis Obispo?

Q. Yes. A. Approximately two and a half months.

Q. When did you arrive in San Luis Obispo from the Soviet Union? A. I arrived—may I take this from where I got off the boat here?

Q. Sure.

Explain it in your own words. A. I landed here the last of July, I believe the 24th of July, and I had forty-five days to get to San Luis Obispo from the time I departed from here, so that that would have made it the middle of September that I arrived in San Luis Obispo.

(652) The Court: That is in the year 1953?

The Witness: That is in the year 1953, yes, sir.

Q. Did your family accompany you? A. They did, yes, sir.

Mr. Donovan: Your Honor, could we, with respect both to the discussion on having his family in Moscow, and now the family here, could we clarify what is meant by the family?

Mr. Tompkins: All right.

The Court: I think you will be given ample opportunity on cross examination to develop anything you think you should. I don't think you should tell the prosecution how to develop its evidence.

Roy A. Rhodes, for Government—Direct.

Mr. Donovan: I am not, your Honor, but at the moment we have no testimony that the man is even married.

The Court: I think you may be right.

Mr. Tompkins: All right; I will ask him—

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. I have one daughter, eight years old now.

Q. Now, when I refer to the family, sergeant, I am referring to Mrs. Rhodes and to your daughter. (653) A. Yes.

Q. Now, did Mrs. Rhodes and your daughter accompany you to San Luis Obispo? A. They did.

Q. Did you live on the Post? A. No.

Q. Where did you live? A. Down the beach. I guess it would be about ten or fifteen miles. Shell Beach.

(654) Q. You say you were in San Luis Obispo about two and a half months? A. Yes, sir.

Q. Were you then assigned to another post? A. I was. I was transferred to Fort Monmouth, New Jersey.

Q. Did your family accompany you? A. They did.

Q. When I refer to your family, I am now referring to Mrs. Rhodes and your daughter. A. Yes, sir.

Q. Did you live on the post there, Sergeant? A. Yes, sir.

Q. Did your family live on the post? A. They did, yes, sir.

Q. Now, how long were you at Fort Monmouth? A. I arrived at Fort Monmouth in December. It was along the middle of December, 1953. And I departed there on the 7th of July, 1954, for Fort Huachuca, Arizona.

Q. When did you arrive then at Fort Huachuca, Arizona? A. About the 15th of August of 1954.

Q. Accompanied by your family? A. By my family—the wife and daughter.

(655) Q. How long were you stationed at Fort Huachuca, Arizona? A. I was there for about a year and a half. I left there in December, 1955, for Fort Monmouth.

Roy A. Rhodes, for Government—Direct.

Q. In other words, you were stationed there, roughly, from August, 1954, to December, 1955? A. Yes, sir, yes, sir.

Q. Now, your family was with you? A. Yes, sir.

Q. Did you live on the post or off the post? A. I lived on the post. It is a housing—

Q. I am talking about Fort Huachuca. A. Oh, Fort Huachuca? I lived in Tucson, Arizona.

Q. So that between the period of August, 1954, and December, 1955, you lived in Tucson, Arizona? A. I did, yes, sir.

Q. Now, when you were transferred or assigned to Monmouth, New Jersey, when did you arrive at Monmouth, New Jersey? A. I believe it was the 2nd of January, 1956, that I arrived at Fort Monmouth.

Q. And how long were you stationed there? A. I was stationed there until June of this year, sir.

Q. Did your family accompany you to Fort Monmouth? (656) A. My family accompanied me to Fort Monmouth, yes, sir.

Q. Did you live on the post during that period? A. Well, in this—in this housing. It is part of the post. It has an Eatontown address, but it is part of the post.

Q. Can you describe Eatontown with relation to Red Bank, for instance? A. Well, they are just a couple of miles apart there. I mean it is almost together actually.

Q. In other words, they are adjoining towns? A. Yes, sir.

Q. Now, Sergeant, directing your attention to the day you testified to, just prior to Christmas, on which you were advised that your family was going to be permitted to join you—do you recall testifying to that? A. Yes, sir.

The Court: You are going back to Moscow now?

Mr. Tompkins: Back to Moscow now, your Honor.

Q. Would you tell us what happened, just briefly, on that day? Where did you receive the news?

Roy A. Rhodes, for Government—Direct.

The Court: We are speaking now of December, 1951, I think.

Mr. Tompkins: December, 1951, your Honor, that is correct. ♣

(657) Q. Just prior to Christmas, I believe you said? A. Just prior to Christmas. This day in question, as I can recall, I had worked in the garage in the morning, and came down to the Embassy for lunch, and on arriving in the Embassy I was notified by the State Department that the Russian foreign office had approved my wife's visa and that she would be joining me shortly.

Q. Did you have lunch? A. I had lunch.

Q. And what did you do after lunch? A. Well, during lunch—I had had a few drinks—that is what you want me to bring out?

Q. Well, whatever happened.

The Court: I think he is going to leave this to your judgment.

The Witness: All right, sir.

Q. Whatever happened after lunch. (658) A. Well, during lunch—I went down to the Marines. There had been a few drinks. In fact, several drinks, before I got around to going back to the garage. On arriving back to the garage, the two Russian nationals, mechanics that worked for me there in the garage, I believe, as I can recall it, that I decided that they should have a drink with me, and so one drink led to another, and apparently it went on all afternoon. At three-thirty or four o'clock in the afternoon, I suppose, something like that, the youngest mechanic's girl friend had his car that day, and she came up to the garage to pick him up, and there was still some of the vodka left that we had been drinking that afternoon, so I said, "Why don't you bring your girl in for a drink?" And when she came in there was a girl with her, and I had never seen the girl before.

Roy A. Rhodes, for Government—Direct.

So we had a few more drinks from whatever was left of the vodka, as I can recall it, and I don't know who suggested it, that maybe we should have dinner that night, but possibly I did. I just can't recall exactly how it got started, but we left the garage in his car with the two girls, and I know we made a trip to, I guess it was, his apartment. I never was inside of it. I don't know what was on the inside of this building.

(659) But anyway he was gone fifteen or twenty minutes. He cleaned up and changed his clothes, and came back to the car, and the four of us went to one of the hotels in Moscow, and the party just rolled on through the night, and I know that I was dancing, drinking and eating with these people, and I have no recollection of leaving the hotel in any way, shape or form. I don't know—possibly I passed out there and they had to carry me out.

I know I woke up the next morning in bed with this girl in what I had taken to be her room.

Mr. Donovan: The defense respectfully moves, your Honor, that all this recital be stricken from the record on the ground that it is not binding on this defendant.

The Court: Not at the present time. I don't know how much of this is material. I have no way of telling at the moment.

Q. Sergeant, do you recall the name of either of the two mechanics that you mentioned that worked in the garage for you? A. The mechanics I know well—they are Vassily and Ivan. I don't know their last names.

The Court: Vassily?

(660) Mr. Donovan: Vassily.

The Witness: Yes.

Q. How do you spell that? A. I never wrote it, but I guess it would be V-A-S-S-I-L-Y, or possibly V-A-S-S-A-L-Y.

Roy A. Rhodes, for Government—Direct.

The Court: And what is the other?

The Witness: Ivan.

Q. After this evening that you mentioned, in question, did you see either of the young ladies thereafter? A. I did.

Q. Both of them or just one? A. Well, other than when this girl friend of the mechanic's drove up to get him at the garage, which I don't remember ever talking to her after that.

Q. This would be the other girl? A. Yes.

Q. Did you see her thereafter? A. Yes, sir. As best I can recall it would be anywhere from five to seven weeks after this party, and as I can recall it, there was this phone call to the mechanic, originally, I mean he answered the phone there in the garage because most of the time it was some Russian who called on the (661) phone, and he spoke a good deal of English, so he normally answered the phone. In this instance I am sure that he answered the phone.

He told me it was this girl. She wanted to talk to me—

Mr. Donovan: I object to this—

Q. Don't tell us what anybody told you— A. Excuse me.

Q. As a result of that phone call, or following that phone call did you see the young lady? A. I did.

I agreed to meet her and did meet her.

Q. Was she alone or was somebody with her? A. At the time that I met her she was by herself.

Q. All right. What did you do? A. I rode the subway to the appointed place where I agreed to meet this girl. So we were walking on the street, and she was telling me that she has trouble—

Mr. Donovan: I object.

The Court: Don't tell us what she said.

Roy A. Rhodes, for Government—Direct.

Q. Not what she said. A. All right. We walked up the street, and we were accosted by two men, two Russians I had taken them to be, nationals.

(662) Q. I beg your pardon. A. At that time I had taken them to be two nationals.

Q. Did one of the men speak English? A. One of the men spoke English.

Q. Do you know the names of either of these two men? A. One of them was introduced as the girl's brother. I have no idea what his name was. The other one was introduced—the girl introduced him, I think, by a Russian name, and he said, "Just call me Bob Day."

Q. Bob Day? A. Bob Smith or Bob Day. I am not positive which name was used, but I believe it was Bob Day.

Q. All right; now, after you met these two men, what did you do? Don't tell us anything about any conversation, but just exactly what did you do? A. We went back into what I had taken to be the room I woke up in prior to this meeting, where I had been after this party.

Q. Did the three of you enter the room? A. The two men and myself, yes, sir. The girl did not go in.

Q. What happened to the girl, do you know? A. She walked on down the hall after we went upstairs.

(663) Q. Did you ever see her after that? A. I have never seen her again.

Q. Now, Bob Smith, or the man that you think is Bob Smith, and another man, and yourself, were in the room. Could you tell us what happened? Not what was said, but what happened?

Did you have a conversation? A. We had a conversation. You said not to tell the conversation.

Q. No, you can't tell what the conversation was. You had a conversation. Is that right? A. That is right.

Q. Did you eat or drink, or anything? A. No.

Q. All right, you just had a conversation? A. That is right.

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Q. How long did it last? A. Two hours, approximately, the best that I can figure it out. Maybe a little longer.

Q. Did you thereafter depart? A. I did.

Q. And where did you go? A. I don't know, but I think I walked back to the Embassy that night.

(664) Q. Now, did you see any of these two individuals at a later date? A. I did.

Q. When did you next see them—either or both? A. There was only one of them, the one I called Bob Day, and he met me three days later—about three days later.

Q. Now, the other man who was with him, at the time, whose name you don't recall, did you ever see him thereafter? A. I never saw him again.

Q. So that three days later, you saw Bob Smith or Bob Day, whatever his name is? A. Yes, sir.

Q. Can you tell us what you did with Bob Smith? A. At this meeting?

I don't know—

Q. Well, where did you go? A. At this meeting I ate—drank—and got drunk—and as to what actually happened at this meeting, I don't actually know.

Q. Now, that was just a meeting between you and Bob Smith? A. That is right.

(665) Q. Do you remember where it took place? A. This was in a hotel. The name I don't know.

Q. And then I assume you went home, back to the Embassy? A. I did.

Q. When did you next see Bob Smith, or Bob Day? A. It would have been two or three months after that.

Q. And where did you see him? A. This was in an apartment.

Q. And did you see him alone? A. No. At this meeting there was—I recall—five other Russians. I had taken them to be Russians. There was two in civilian clothes and three in military uniform.

Q. You said that they were in military uniform. And military uniform of what nation? A. Of Russia.

Roy A. Rhodes, for Government—Direct.

Q. All right.

Now, will you go on and tell us what happened in that room? A. Well, here I believe—without saying what was said I can't.

Q. Well, did you have a meeting? A. We had a meeting.

(666) Q. Did you eat? A. I don't recall. I believe I drank a little. There was eats there if I wanted to use them.

Q. And how long did that meeting last? A. It would have been about the same time, anywhere from an hour and a half to two hours.

Q. Now, Sergeant, did you have meetings with these individuals whom we have just described—you know only the name of one as I understand it.— A. That is true.

Q. —thereafter, on several occasions? A. On several occasions.

I think a total of maybe fifteen times.

Q. In other words, would those fifteen meetings cover from the time of the first meeting with Bob Smith to the end of your tour of duty? A. It did, yes, sir.

The Court: Were these meetings with the same five men, two being civilians and three in military uniforms?

The Witness: No.

Can I answer that?

Mr. Tompkins: Yes, yes—

The Witness: No, sir. My meetings almost (667) completely were with the one individual. There were only two or three times where there was more than one individual present.

The Court: And was that individual usually the one that you knew as Bob Smith or Bob Day?

The Witness: He was the one.

Q. In more than one of the meetings were people present in the military uniforms that you described? A. There was one other meeting where there were military uniforms present, yes, sir.

Roy A. Rhodes, for Government—Direct.

Q. Now, you say there were about fifteen of these meetings, and you say that usually one and on several occasions more than one person was present. Is that right?

A. Yes, sir.

Q. Now, at these meetings, did you furnish any information? A. Yes, sir.

Q. To these people? A. Yes, sir.

Q. Did you at any time—

The Court: What was the answer?

The Witness: Yes, sir.

Q. Did you at any time receive money from these individuals? (668) A. Yes, sir.

Q. Would you tell us the total amount, we will say, over the period that you were in Moscow? A. Somewhere between \$2,500 and \$3,000.

Q. Do you recall the number of times the money was given to you?

In other words—

A. Five or six times, I believe.

Q. Do you recall the first payment or the first sum—excuse me—that was given to you, Sergeant? A. I do. The first money I had from them, I discovered it in my clothing after I returned from Germany, I don't know whether just a day or two after I got back from Germany, or several days after I got back from Germany, going back to the meeting at the hotel with Bob Smith or Day, the following night I left Moscow for Germany to get my family in Germany, in Frankfort—I was gone approximately 12 to 15 days, total, and I got back into Moscow about the 20th of February, and some time after that, and prior to the next meeting I had had with the Russians, I discovered I had two thousand rubles of money that I could not account for.

(669) Q. What is the two thousand rubles in American money? A. Five hundred dollars.

Q. And then is it your testimony that maybe on five or six other occasions you received money from the Russians? A. Yes, sir.

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Q. Now, Sergeant, did you give any receipts for this money? A. I did.

Q. Were they receipts signed by you? A. They were.

Q. In your own handwriting? A. In my own handwriting.

Q. If you recall, sergeant, did you give these people any written statements? A. I just don't know, sir.

Q. You have no recollection? A. I have no recollection, no, sir.

Q. Now, you stated that you did give information to—
A. Yes, sir.

Q. —these people? A. Yes, sir.

Q. Was your information truthful or untruthful? (670)
A. Some of both.

Q. In other words, you gave them some true information, and some of it was not the truth? A. That is true.

Q. Now, did you furnish these people with information as to your place of birth, for instance? A. I did.

Q. Did you furnish these people with the year of your birth, which you have testified to already? A. I did.

Q. And the name of your father? A. Yes, sir.

Q. Your rank? A. Yes, sir.

Q. Did you furnish them with information with relation to your duties in the Embassy? A. Yes, sir.

Q. Did you furnish them with information that you had been trained in code work? A. Yes, sir.

Q. Now, when you received your change of assignment, duty assignment, to San Luis Obispo, did you advise them of that? A. Yes, sir.

(671) Q. Do you recall how you advised them, sergeant? Did you show them your orders or did you just verbally tell them? A. I believe I verbally told them. I don't recall showing my orders. I don't recall having any at that time actually.

Q. Now, do you recall whether you furnished them information relative to the habits of military personnel assigned to the Embassy? A. Yes, sir.

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Q. And relative to the habits of State Department personnel? A. Yes, sir.

Q. Now, prior to the time that you went to Moscow, Sergeant, you stated that you were in the Army, as I understand it. A. Yes, sir.

Q. Were you stationed at Aberdeen, Maryland? A. I was, sir.

Q. Where else were you stationed? A. After World War II I was stationed at Aberdeen, Maryland, and Fort Belvoir, Virginia.

Q. And after Fort Belvoir, where? A. The Pentagon.

(672) Q. And during the time that you were in the Pentagon, what kind of training did you receive? A. During the time that I was in the Pentagon I received code room training, administration, and finance, I believe.

Q. Did you furnish information to these individuals that you testified about concerning your duties in Aberdeen? A. Yes, sir.

Q. Concerning your duties at Fort Belvoir? A. Yes, sir.

Q. And concerning your duties at the Pentagon? A. Yes, sir.

Q. And would that include your code training while you were at the Pentagon in 1950? A. Yes, sir.

Q. Now, sergeant, after you returned to the United States did you have a method of communicating—by that I mean getting in touch with the Russian Embassy in the United States? A. I did, yes, sir.

Q. Now, will you tell us about that, please? A. On departing from Moscow, there were three systems for communicating.

(673) For me to get in communication with the Russians I was to furnish, from the New York Times, any article I picked out that was critical in relation to the Russian economy, the Russian Embassy, whatever you have, as long as it was critical of Russia.

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Three of these articles from any paper were to be lettered with a big question mark in red crayola or pencil, and sent to the Russian Embassy in Washington, D. C.

These were to be dispatched on any given day of the week, but the same day for three weeks running I should mail one of these critical items. On the fourth week, on the same day, I was to be in front of a theatre in Mexico City, in Old Mexico, for a contact with whoever they designated to meet me.

Q. Did you have any knowledge of how you were to be dressed? A. There was no particular dress, but I was to be carrying or smoking a pipe that they furnished me.

Q. Sergeant, I have here Government's Exhibit No. 70 for identification. Will you look at that and tell us—or identify it. A. That was the pipe I was given by the Russians, or at least a similar one, that I gave to the F. B. I.

The Court: Mr. Tompkins, you don't expect to (674) finish your direct this afternoon, do you?

Mr. Tompkins: I might be through in just a couple of minutes, your Honor.

We will offer the pipe in evidence at this time, your Honor.

Mr. Donovan: We of course object on the same basis of the objection which I made to this whole line of testimony.

The Court: Objection overruled.

It is all subject to a motion to strike if this testimony is not brought home to the defendants or the alleged conspiracy.

Q. Sergeant, you mentioned that one time you lived in Red Bank, New Jersey? A. No, sir. I never lived in Red Bank.

Q. It has always been Eatontown? A. It has always been Eatontown, yes, sir.

Q. Is your wife employed? A. She is, yes, sir.

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Q. Is she in the garage business? A. No, sir.

Q. Do you have a brother who is employed? A. I do, yes, sir.

Q. And that is the brother you mentioned— (675) A. In Colorado Springs, yes, sir.

Q. In Colorado Springs? A. Yes, sir..

Q. Do you know whether he has ever worked in Georgia? A. No, he has never worked in Georgia.

Q. Do you know whether he has ever worked in an atomic energy plant? A. He has never worked in an atomic energy plant.

Q. Now, after you came back to the United States, getting back to your instructions for a minute, did you try to communicate with the Russian Embassy? A. No, sir.

Q. Did you try and communicate with anybody in this country? A. No, sir.

Mr. Tompkins: No further questions, your Honor.

Mr. Donovan: I move to strike the entire line of testimony and ask that the jury be instructed to disregard it as incompetent and immaterial and not binding on this defendant.

The Court: Well, I have in mind—if you would prefer that I should not answer you in the presence of the jury, I will excuse them. I have in mind certain aspects of the Hayhanen testimony that I think (676) would forbid me to grant your motion, but if you prefer to discuss that out of the hearing of the jury I will do it.

Mr. Donovan: Could I suggest, your Honor, in view of the hour, that we have such a discussion outside the presence of the jury, that they be excused, and that I be permitted to commence cross examination in the morning?

The Court: Oh, sure.

Mr. Donovan: Your Honor, we of course would like to have any statements which the Government

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may have by this witness concerning any matter with respect to which he has testified here.

Mr. Tompkins: If your Honor please, we have written statements. We will certainly furnish them to the defense. The question comes up—there may be some reports of which there are notes.

Is your demand directed to the notes?

We have a number of written statements which we will make available to the defense.

The Court: Why don't you furnish the written statements?

Mr. Donovan: All right, sir, the Government will do that.

(677) Mr. Donovan: Our demand, of course, your Honor, would be for anything to which we are entitled under 3500, which would include any substantially verbatim notes.

The Court: Yes; but having looked at one set of notes, I have no desire to look at another set of notes, unless Mr. Tompkins is in any doubt concerning the applicability of Subdivision E, Paragraph 2, Title 18, Chapter 223—No—I guess it is Section 3500.

Mr. Tompkins: If your Honor please, I don't think we have the problem as we did originally. I think that practically everything is in the witness' handwriting. We do have this one problem. There are one or two statements contained in these written statements which the Government would like to have X'd out. In other words, they have not been the subject of direct examination, and they deal with something outside the scope of this trial and the witness' testimony.

The Court: Well, it would be the duty of the Court to deal with that—

Mr. Tompkins: All right, sir.

The Court: —when those statements are used (678) for the purpose of cross examination. Under

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the law as I understand it they may not be availed of except as to matters concerning which the witness has testified on direct. I think that is the precise provision of the law.

Mr. Tompkins: That is, your Honor.

The Court: Now, members of the jury, you will be excused until tomorrow morning at 10:30.

I must repeat, please do not let any person whomsoever communicate with you about this case directly or indirectly. Do not discuss it among yourselves.

Tomorrow morning.

(The jury thereupon withdrew from the court room.)

The Court: Now, do you wish to discuss that subject, or shall we postpone all discussions until tomorrow morning?

Mr. Donovan: Well, of course, your Honor, if you were to rule in our favor, then I am spared the task of preparing cross examination.

The Court: Well, you will recall Hayhanen's testimony that he telephoned to Mrs. Brown, that he was instructed to do that by this defendant. He was unsuccessful in getting in touch with him, but (679) nonetheless he did that, and I think that that may be one of the overt acts alleged. I am not sure.

Mr. Fraiman: Yes, it is, your Honor.

The Court: Now, have I the right to strike that testimony in view of that?

Mr. Fraiman: Our position, your Honor, is this, if I might state it.

We state, first, that the witness Rhodes is not a co-conspirator in this case. He is neither named in the indictment as a co-conspirator, and he is not one of the co-conspirators to the Grand Jury unknown inasmuch as Hayhanen testified before the Grand Jury, and there is an overt act in the indictment

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which refers indirectly to the witness Rhodes—inasmuch as he is not a co-conspirator either named in the indictment, or unknown, it is our position that acts and declarations made by such a man are not binding upon the defendant, particularly where, as here, they are of a highly prejudicial nature.

The Court: I don't think that this is offered as binding on the defendant. I think this is offered as evidence tending to show that a conspiracy existed, and that one of the purposes of the conspiracy was to seek to avail the conspirators of the services of (680) this witness.

Mr. Tompkins: Certainly, your Honor, in Hayhanen's direct testimony, when I asked him about his assignments, one of his assignments, he answered one assignment, Mark got instructions from Moscow to locate one illegal agent, and in that message was information that his wife has three garages in Red Bank, and we made a trip to Red Bank and could not locate it. Here we have the witness testifying to conversations to a trip taken with the defendant, and then to taking a trip to Colorado pursuant to instructions by the defendant.

I think this not alone corroborates Hayhanen's testimony, but I think it goes definitely to the intent.

Mr. Donovan: Your Honor, whatever conspiracy may have existed we respectfully submit that there is no evidence relating it to this defendant. In other words, with respect to this man's betraying his own country in Moscow, about which we have heard all this testimony, there is nothing relating any of those events to this defendant, and we submit that it is highly prejudicial.

Mr. Fraiman: If your Honor please, if this (681) evidence is admitted for the purpose of corroborating the testimony of Hayhanen—Hayhanen's testimony was to the effect that he was asked to

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contact a certain person whom he believed to be in Colorado. That was his only testimony with respect to this witness, Rhodes.

Now, to corroborate that testimony the Government introduced into evidence Government's Exhibit No. 18, which was the message that he was given to enable him to contact this man Rhodes. Now the Government is offering a live witness to corroborate a piece of corroborating evidence, and this witness' testimony has nothing to do with corroborating his original statement that he was asked to go to Colorado and contact a certain individual, and that was his only testimony with respect to this witness.

Mr. Tompkins: I don't understand that to be the Government's position, either, your Honor. I think that there is a message——

The Court: Do you mind if I interrupt you?

Mr. Tompkins: I am sorry, your Honor.

The Court: Of course, my notes are not impeccable. I don't say that they are. But I have this (682) entry: "Mark said he had instructions to locate Rhodes."

Mr. Fraiman: Yes, sir.

Mr. Tompkins: That is right.

Mr. Fraiman: That is the only testimony with respect to Rhodes by Hayhanen. I don't believe that this testimony of this witness is corroborative of that statement by Hayhanen.

Mr. Tompkins: There is more than just that testimony by Hayhanen. There are about five or six pages of conversations with the defendant, your Honor, in addition to the one which your Honor just recalled I have already cited on page 211 of the transcript.

Mr. Donovan: Your Honor, 99 per cent of this man's testimony this afternoon is with respect to a conspiracy, if it existed, totally unrelated to that charged in this indictment.

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There is no testimony, your Honor, that this man ever knew the defendant, and no testimony that this man ever knew Hayhanen. There is no testimony that he ever knew anyone named as a co-conspirator in this indictment.

The Court: In this kind of a conspiracy, Mr. Donovan, it wouldn't be any surprise to you that several (683) of the conspirators do not know several of the other conspirators. This is not the kind of a little two per cent conspiracy entered into to burn down a building. This is a pretty widespread conspiracy.

Mr. Donovan: Your Honor, this conspiracy in this case is supposed to be one planned by Soviet Military Intelligence.

The other conspiracy that we heard about this afternoon would seem to be nothing but the misfortunes of a man who got drunk in Moscow and did these various things, but I respectfully submit that there is no link that makes this evidence competent in this case.

The Court: Well, I am not prepared to say yes and I am not prepared to say no.

I would like to reserve decision on your motion.

Mr. Donovan: Thank you.

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(685) The Court: Gentlemen, I reserved decision yesterday on Mr. Donovan's motion.

I wonder if you feel you ought to argue it any more than you have. Do you wish to argue it any more than you have?

Mr. Donovan: Well, your Honor, we believe that we have stated for the record substantially all the reasons why this man's testimony should be stricken.

It could be developed further if your Honor would care to hear additional oral argument, but I

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believe that substantially we would be making the same point.

The Court: I think I understand the argument as you have stated it.

My only thought was that perhaps you wished to add some thoughts, some new thoughts.

(686) If you have stated the situation as you understand it completely, I am not going to suggest any further argument.

Mr. Donovan: Yes, your Honor.

The Court: I have re-examined the testimony of the witness Rhodes, and also the testimony of Hayhanen with regard to his trip to Colorado, and I am not able to see at the present time that the motion to strike Rhodes' testimony should be granted on the theory that it could not be considered evidence in support of the allegations contained in subdivision 4 of Count One of the indictment, which is also subdivision 4 of Count Two, I think.

Is that correct?

Mr. Tompkins: That is correct, your Honor.

The Court: Obviously Count Three isn't involved in this testimony, and I don't think that I should be justified in stating that, as a matter of law, the testimony given yesterday afternoon could not be considered by the jury as possibly tending to support the allegations to which I referred.

Therefore the defendant's motion is denied.

(687) Mr. Donovan: Respectfully except, your Honor.

Your Honor, before commencing any cross examination of this witness, may Mr. Tompkins and I approach the Bench?

The Court: Surely.

(Whereupon there was a side-bar discussion between the Court, Mr. Tompkins, and Mr. Donovan, not within the hearing of the jury.)

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The Court: We will take a recess, members of the jury, for thirty minutes. I guess you had better wait in the jury room.

(Whereupon the jury retired from the court room.)

(688) (Recess had.)

ROY A. RHODES, resumed the stand, and testified further as follows:

The Court: Members of the jury, as you probably realize, when we took a recess it was for the purpose of a consultation between the Court, counsel for both sides, and other representatives of the United States Government.

As the result of that conference, it was brought to light that the witness Rhodes gave certain statements to the Army and to the F. B. I. during the month of June, 1957 and, I think, July and perhaps later.

Those statements were the basis of the consultation.

At the end of the discussion, which was quite informal, the United States concedes with respect to one item referred to in those statements this witness has made conflicting statements.

The subject matter involved was not brought out on his direct testimony because, in the opinion of the Government, it would not have been in the interests of national security for that subject to have been inquired into.

The conflict pertained to his version of his (689) activities in Moscow, and an important incident which there occurred.

Both counsel have agreed that since this concession is before the jury, namely the concession that the witness has made conflicting statements, the wit-

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ness has been to this extent discredited. Such is the purpose of cross examination.

Counsel for both sides have agreed that no useful purpose would be served by pursuing the subject further.

Mr. Donovan: Your Honor, I have been conferring with Government's counsel as to the cross examination of this witness; and they are agreeable, if it would be satisfactory to your Honor, that the cross examination commence at two o'clock and that meanwhile, however, the Government does have some pro forma record evidence which they would like to put in which Mr. Fraiman could attend to while I am enabled to prepare cross examination.

The Court: You mean matters concerning which this witness has already been examined or other matters?

Mr. Tompkins: They are other matters. They are records, your Honor.

(690) The Court: Having to do with the direct testimony of this witness?

Mr. Tompkins: They do not, your Honor.

Mr. Donovan: They do not, your Honor.

The Court: What you are suggesting is that the witness be excused for cross examination until two o'clock?

Mr. Donovan: Yes, your Honor.

The Court: And in the meantime, other matters be taken up?

Mr. Donovan: Yes.

Mr. Tompkins: That is right. Just a few.

In the light of the conference, Mr. Donovan asked, and properly so, for an opportunity to review these statements until two, and I think that it is a fair request.

The Court: All right, gentlemen.

Government Exhibit No. 71.

Mr. Maroney: This first exhibit, your Honor, that has been marked Government's Exhibit No. 71 for identification is a bank signature card which it is our understanding that counsel for the defense is agreeable to stipulate may go in evidence without a witness to identify the document.

Is that correct?

(691) The Court: That is a signature card?

Mr. Maroney: Yes, sir.

The Court: In connection with a bank account in what bank?

Mr. Maroney: The National City Bank of New York.

The Court: Has it a date?

Mr. Maroney: It is dated "Today's date: June 19, 1950."

The Court: June 19?

Mr. Maroney: 1950.

The Court: 1950.

And in whose name is the account?

Mr. Maroney: It is in the name of E. R. Goldfus. His address is listed as 216 West 99th Street, New York 25.

The Court: It purports to bear the signature of that depositor?

Mr. Maroney: Yes, sir.

Mr. Fraiman: The defendant, your Honor, would stipulate that Government's Exhibit No. 71 for identification is a record kept in the regular course of business of the National City Bank of New York.

The Court: Is it one of the branches or the (692) main office, or doesn't it appear?

Mr. Fraiman: The card does not seem to identify which branch or whether it is the main office of the bank.

Mr. Maroney: This card, which is now marked Exhibit No. 71 in evidence—

Mr. Fraiman: Excuse me, Mr. Maroney.

Government Exhibit No. 72.

Your Honor, with respect to the admission of the card in evidence, the defendant objects to its admissibility on the ground that there has been no showing as to its materiality.

We, of course, are stipulating to it as to the authenticity.

The Court: You stipulate the authenticity of it?

Mr. Fraiman: Yes, your Honor.

The Court: But you object to its admission in evidence?

Mr. Fraiman: On the ground that there is no showing as to the card's materiality.

The Court: I will receive it and reserve a motion to strike, if it is not connected.

Mr. Fraiman: Thank you.

Mr. Maroney: The card also reflects that the (693) E. R. Goldfus whose signature appears thereon is employed by "Self."

"Birth place: New York.

"Date of birth: August 8, 1902.

"Occupation: Photographer.

"Father's name: Emil.

"Mother's name: Helen.

"Name of husband or wife"—contains a line indicating none.

"Citizen of U. S. A."

(The signature card dated June 19, 1950, was marked Government's Exhibit No. 71 and received in evidence.)

Mr. Maroney: The next exhibit, your Honor, is Government's Exhibit No. 72 for identification, which are photostatic copies of bank records of the National City Bank of New York, the signature card of which contains the date of 1-5-54, and also attached to the signature card is a ledger sheet dealing with the period from January, 1954 to July, 1955.

Government Exhibit No. 72.

The Court: Does the signature card purport to be different from Exhibit No. 71?

Mr. Maroney: Yes, sir.

(694) The Court: It relates to a different account?

Mr. Maroney: Yes, sir.

I believe this one was a different branch of the bank, and it also bears a different date.

Mr. Fraiman: Your Honor, there is no testimony here as to what the branch was on the first card, and I object to Mr. Maroney's characterizing this as a different branch.

The Court: I am wondering why two signature cards are offered. Ordinarily there are not two signature cards for one account.

Mr. Maroney: These, your Honor, are the records of the bank, the branch located at 181 Montague Street in Brooklyn.

The previous exhibit, 71—

Mr. Fraiman: May I ask Mr. Maroney if he is referring to something on the exhibit itself?

Mr. Maroney: It has been our understanding, your Honor, that counsel would stipulate that if the bank officers appeared with these records that they would present the records—

The Court: They would testify that those are correct copies of their records; is that it?

Mr. Maroney: That is correct.

(695) And the card previously in evidence, Exhibit No. 71, shows or contains a stamp notation "96th Street Branch."

Now, if counsel will stipulate that these are copies of bank records of the National City Bank of New York, of the branch located at 181 Montague Street in Brooklyn, the Government at this time offers them in evidence, your Honor.

Government Exhibit No. 72.

The Court: Authenticity conceded. Relevancy contested, is that it?

Mr. Fraiman: With respect to this latter exhibit, your Honor, Government's Exhibit No. 72 for identification, I notice a stamp on the back of that—the original of that exhibit—which says “Peoples Trust Branch.”

I don't know if that is the same branch that Mr. Maroney just mentioned or not.

Mr. Maroney: It is my understanding of that, your Honor, that it used to be the Peoples Trust Branch, and there has been a merger and it is now the 181 Montague Street branch.

Mr. Fraiman: We will accept Mr. Maroney's statement.

The Court: The relevancy is contested, is (696) that it?

Mr. Fraiman: Yes, your Honor.

The Court: Objection overruled, subject to motion to strike.

(Photostatic copies of bank records and signature card dated 1-5-54 was marked Government's Exhibit No. 72 and received in evidence.)

The Court: Do you know the name of the depositor?

Mr. Maroney: Yes, sir. Exhibit No. 72 in evidence reflects the depositor's name and his signature appears on the signature card as E. R. Goldfus, and then printed above the signature is “Emil R. Goldfus.”

It reflects the home address of Mr. Goldfus as being 170 Hicks Street in Brooklyn.

“Employed by: Self.”

“Birth Place: New York.

“Date of birth: 8-2-02.

“Occupation: Photographer.

Government Exhibit No. 73.

"Father's name: Emil.

"Mother's maiden name: Helen Troutwein.

"Citizen of U. S. A."

No wife indicated, and the date of the card (697) is January 5, 1954.

The second sheet of the exhibit, which is a ledger card previously referred to, shows a withdrawal on July 6, 1955, of \$1,162.59.

The Court: \$1,162——

Mr. Maroney: Fifty-nine cents. Leaving a balance in the account of zero.

(698) Mr. Maroney: The ledger sheet also shows——

The Court: That was July 6th? What year?

Mr. Maroney: 1955.

The ledger sheet shows a block stamp, showing okay for filing, account closed, date, 7-6-55; and reflecting the number of the teller.

This sheet also contains, purports to show, the signature of E. R. Goldfus, your Honor.

The third item of the exhibit is a photostatic copy of a check drawn by E. R. Goldfus on the National City Bank of New York in the sum of \$1,162.59—it is not a check, your Honor, it is a withdrawal receipt.

Next exhibit marked Government's Exhibit 73 for identification is a signature card of the Benjamin Franklin Hotel, 222 West 77th Street, New York City; and it reflects the name, E. R. Goldfus, of the address 252 Fulton Street, Brooklyn, New York.

Upon our understanding as to the stipulation as to the authenticity of the document we at this time offer Government's Exhibit 73 for identification in evidence.

The Court: Same objection, same ruling.

Mr. Maroney: The signature card reflects that (699) Mr. Goldfus arrived at the hotel on September 28, 1956, and departed on April 17, 1957.

Government Exhibit No. 74.

It also reflects information as to the room occupied and the rate and a key deposit.

On the reverse side of the signature card there is a notation, in emergency notify, and then filled into the form is, Bert Silverman, address 252 Fulton Street, relationship, friend.

The Court: The name was?

Mr. Maroney: Bert Silverman.

Next exhibit, Government's Exhibit 74 for identification, is a signature card and ledger sheets of the Broadway Central Hotel, 673 Broadway, New York, New York.

The Court: Broadway Central?

Mr. Maroney: Yes, sir.

Upon our understanding of the stipulation of the authenticity of these records, the Government offers 74 for identification into evidence, your Honor.

The Court: Same objection, same ruling, and reservation.

Mr. Maroney: This exhibit 74 in evidence, the first sheet of which is a signature card of the Broadway Central Hotel, reflects the name and purported (700) signature of Martin Collins.

The Court: Martin Collins?

Mr. Maroney: Yes, sir.

The address given on the registration card appears to be 3640 West Wilson, Chicago.

The Court: Does it give an arrival date?

Mr. Maroney: The next two sheets, the ledger sheets of the hotel reflect that Room 347 of the Hotel was occupied by Mr. Collins from April 19th to—

The Court: What year?

Mr. Maroney: To April 26, 1957.

The Court: April 19, 1957?

Mr. Maroney: Yes, sir.

The Court: Departure?

Mr. Maroney: Departure, April 26, 1957.

Government Exhibit No. 75.

And the ledger sheets also reflect payment of the room rent for each day during the period from April 19th through April 26th.

The next, and I think last exhibit, in this series, Government's Exhibit 75 for identification, is the original of the records of the Daytona Plaza Hotel, Daytona Beach, Florida.

Upon stipulation of the authenticity of these records the Government at this time offers Exhibit 75 (701) for identification into evidence.

Mr. Fraiman: May I see that, please?

(Exhibit 75 for identification was exhibited to Mr. Fraiman.)

Mr. Fraiman: Same objection.

The Court: Same ruling.

Mr. Maroney: The first sheet of the records which comprise Government's Exhibit 75 in evidence is the signature card, or the registration card of the Daytona Plaza, reflecting the purported signature of Martin Collins and the address given for Mr. Collins is Beekman Hotel, Broadway and 77th, New York, New York.

The next four sheets are ledger sheets of the hotel reflecting occupancy by Martin Collins of a room during the period from April 28th through May 17th.

The Court: What year?

Mr. Maroney: I don't find the year reflected.

Mr. Fraiman: We will stipulate that it is 1957, that the year doesn't appear on there.

The Court: 1957?

Mr. Fraiman: That if called the hotel manager would so testify.

(702) The Court: I didn't hear that.

Mr. Maroney: If called the hotel officer would testify that these are records for 1957.

As a matter of fact, they do contain the year.

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Roy A. Rhodes, for Government—Cross.

(703) *Cross examination by Mr. Donovan:*

Mr. Donovan: May it please the Court, would the defendant rise?

(The defendant thereupon arose.)

Q. Sergeant Rhodes, have you ever seen this man before? A. No, sir.

Q. Do you recognize him as anyone you have ever known under any name? A. No, sir.

Q. Do you know a man named Rudolf Abel? A. No, sir.

Q. Do you know a man named Emil Goldfus? A. No, sir.

Q. Do you know a man named Martin Collins? A. No, sir.

Q. Do you know a man named Reino Hayhanen, also known as Vik? (704) A. No, sir.

Q. Do you know a man named Eugene Maki? A. No, sir.

Q. Do you know a man named Mikhail Svirin? A. No, sir.

Q. Do you know a man named Vitali G. Pavlov? A. I don't think so. No, sir.

Q. Do you know a man named Alexander M. Korotkin? A. No, sir.

(Mr. Donovan was then asked for the spelling of Korotkin, K-O-R-O-T-K-I-N.)

Mr. Donovan: K-O-R-O-T-K-I-N—I am sorry, it is K-O-R-O-T-K-O-V.

Q. Do you know a man named Korotkov? A. No, sir.

Q. Your answer is still no? A. No, sir—I mean, yes, sir, it is still no.

Q. Have you ever had any representative of Soviet Russia communicate personally with you in the United States? A. No, sir, not to my knowledge.

Q. In the United States did you ever transmit to any Russian, information concerning the national defense of the United States? (705) A. No, sir.

Roy A. Rhodes, for Government—Cross.

Q. Did you in the United States ever receive any such information for any Russian? A. No, sir.

Mr. Donovan: Your Honor, I respectfully renew my motion to strike the man's entire testimony.

The Court: The same ruling.

Q. Now, yesterday, Sergeant, you testified concerning transmitting information to Russian officials while you were stationed in Moscow. Is that correct? A. Yes, sir.

Q. Did you at the time make any report on these treasonable activities to your superiors, to your superior officer? A. No, sir.

(706) Q. Did you make any report on these activities to any American official? A. No, sir.

Q. What was the first time when you admitted these activities to any official of the United States? A. To the F. B. I. in last of June, I believe, of this year.

Q. Now, yesterday, Sergeant, as I understood you, you testified that your first meeting with that Russian girl occurred after you were celebrating the expected arrival of your wife and daughter in Russia; is that correct? A. That is the way I can recall it, yes, sir.

Q. Now, is it not true that long after your family arrived in Moscow that you attended a party in a hotel in Moscow— A. Is that all?

Q. No.

—at which uniformed Russians were present? A. I did, yes, sir.

Q. Is it not a fact, sir, that subsequently that same evening that you found yourself in bed with a girl? A. I found myself alone with her, yes, sir. (707) I don't recall finding myself in bed with her, no, sir.

Q. Would it help to refresh your recollection if I read to you the statement signed by you on July 2, 1957 and given to the F. B. I. which says, in part:

"At this party in the hotel room we also ate and drank, and I proceeded to get drunk.

Roy A. Rhodes, for Government—Cross.

"I remember that some one in the party had a girl brought in, and I was talking to her. I am very hazy on what took place, but recall at one time in the evening everybody had evidently left the room and I found myself alone on the bed with this girl." A. That is true, I believe.

Q. Now, this is after your wife— A. That's right.

Q. —and daughter had arrived in Moscow? A. That's right.

Q. Isn't that correct? A. Yes, sir.

The Court: Just a moment.

Is it correct to say that, Mr. Donovan has been reading from a report furnished to him by the United States Attorney?

Mr. Tompkins: That is correct, your Honor. It is a report we furnished Mr. Donovan yesterday pursuant to his motion.

By Mr. Donovan:

Q. Now, while you were in Moscow attached to the American Embassy used you drink any intoxicating liquors?

A. I beg your pardon?

Q. I said, while you were in Moscow attached to the United States Embassy used you frequently drink intoxicating liquors? A. I did, yes, sir.

Q. What liquor? A. Whisky, vodka, almost anything you want to name.

The Court: You mean anything you could get?

The Witness: Yes, sir.

By Mr. Donovan:

Q. In what quantities would you drink these liquors?

A. They weren't moderate.

Q. Isn't the truth, Sergeant, that while you were in the American Embassy in Moscow—

The Court: Just a minute. You don't mean that.

Roy A. Rhodes, for Government—Cross.

Q. While attached to the American Embassy in Moscow for service as a United States Master Sergeant, is it not true that for the last two months of your stay in Moscow you were drunk every day? A. I believe that is right, yes, sir.

(709) Q. Now, you testified yesterday, Sergeant, that during the period of time you were selling information to the Russians that you received in return between \$2,500 and \$3,000? A. The best I can recall it, that's about what it figured out.

Q. Isn't a fact that over the same period you deposited in your personal bank account approximately \$19,000? A. No, sir.

Q. How much did you deposit, to the best of your recollection? A. That—I—Can I explain that?

Q. No. I want the answer to the question.

I want to know how much you deposited while you were in Moscow? A. All right—

The Court: Are you speaking now of the entire period?

Mr. Donovan: I was speaking, your Honor, of the period during which he says that he received only \$2500 to \$3000 from the Russians.

The Witness: That is right. But my wages all went home.

(710) By Mr. Donovan:

Q. Again, is it not true that over the last year and a half you were in Moscow that you deposited around \$19,000 in your bank account? A. No, sir. I was in Moscow over two years, and my total wages went home, which would have run around \$15,000, maybe more, I don't know.

I never figured it up.

Pay and allowances there would have run to eight or nine hundred dollars a month.

I lived off the check, It all went home, and I checked back all of it out. When I left Moscow there was maybe four or five hundred dollars in my bank account.

Roy A. Rhodes, for Government—Cross.

Q. Are you denying under oath that you deposited any such amounts of money in your bank account? A. No. I said it went.

Q. You are not suggesting that all this was your salary as a sergeant? A. That's right.

Q. Do you deny making statements to Army interrogation officers, in which you not only admitted that the \$19,000 was approximately right, but attempted to explain it on the ground that you were dealing in a black market in Russian rubles? (711) A. No.

Q. Don't you remember making that statement? A. Certainly I made that statement.

Q. In October, 1952, for example, didn't you write a check on your personal account in the amount of \$1100 to a Dr. Backerhock? A. I did.

Q. What was it for? A. I—I can't recall what it was for.

Q. You are a sergeant in the Army. You mean you write so many \$1100 checks that you can't recall why you made one out to a Russian doctor? A. I have no idea that it was a Russian doctor.

This check came up before.

Q. You just make them out to anyone? A. As well as I can explain that one, because I have no recollection of the check.

Q. Now, are you still a master sergeant in the United States Army? A. I am still a master sergeant in the United States Army.

Q. Are you still drawing regular pay? A. I am still drawing regular pay.

Q. What is the amount of that pay? A. It would figure out, pay and allowances, about three-fifty a month.

(712) Q. You are still drawing this regularly? A. That's right, yes, sir.

Q. Now, with respect to this treason to which you have confessed—

The Court: I think you ought to change the form of the question.

Roy A. Rhodes, for Government—Cross.

“With respect to the activities which you say you conducted in Moscow.”

I don't think you should brand them. Treason is possible only in time of war.

Mr. Donovan: Would it be satisfactory to the Court if I rephrased it to ask him about his betrayal of his own country?

Mr. Tompkins: If your Honor please, I think just the facts speak for themselves. We don't have to characterize them.

The Court: I think if you phrase the question so as to make it clear that you refer to the activities that he says he conducted in Moscow and for which he was paid, you will make your point, Mr. Donovan.

By Mr. Donovan:

Q. With respect to your activities in Moscow with these Russians and for which you received money from them, (713) have you ever been court-martialed in— A. I have not.

Q. —in connection with these activities? A. No, sir.

Q. Have you ever been arrested? A. No, sir.

Q. Have you ever been indicted? A. No, sir.

Q. And you are still on duty and drawing pay? A. As far as I know, yes, sir.

Q. Sergeant, I think you testified that you are a native-born American? A. Yes, sir.

Q. Are your parents native-born? A. Yes, sir.

Q. Were you educated in this country? A. I was.

Q. Did you ever hear of a man named Benedict Arnold? A. Yes, sir.

Q. How does he stay in your mind as a figure in American history? A. Not so good.

Q. I didn't ask you that. A. Yes, you did.

(714) Q. I didn't hear your answer. A. I said not so good.

Roy A. Rhodes, for Government—Re-direct.

Q. I asked you how you would think of him. A. I answered that, I said not so good.

Q. Why? A. I—

Q. Isn't it because he betrayed his country? A. I think so.

Q. Do you know enough history to know that even Benedict Arnold didn't do it for money? A. I know it.

Mr. Donovan: Sergeant, Benedict Arnold may have been the greatest traitor in American military history, but it was only until today.

The Court: Is that a question?

Mr. Donovan: It is an attempted statement of fact.

Re-direct examination by Mr. Tompkins:

Q. Sergeant, you are in arrest of quarters, aren't you?

A. That is right, yes, sir.

Q. One more question.

What do you mean by arrest of quarters? (715) A. I mean I can't leave the post.

Mr. Tompkins: Your Honor, I think Mr. Donovan will agree with me that the last statement of his should properly be stricken from the record.

It wasn't a question. I think Mr. Donovan made the statement—

Mr. Donovan: I didn't want to make it in the record, your Honor. I just wanted to make it.

The Court: You had the satisfaction of making it. Now, are you willing that it be stricken from the record?

Mr. Donovan: Very well.

The Court: Is that all of this witness?

Mr. Tompkins: I have no further questions.

Mr. Donovan: No further questions.

(Witness excused.)

Neil D. Heiner, for Government—Direct.

(716) NEIL D. HEINER, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Tompkins:

Q. Mr. Heiner, where do you live? A. 123 Millard Avenue in Bronxville.

Q. By whom are you employed? A. I am a special agent in the Federal Bureau of Investigation.

Q. How long have you been a special agent of the Federal Bureau of Investigation? (717) A. It will be seven years in January.

Q. Directing your attention to May 23, 1957, were you in the vicinity of 252 Fulton Street, Brooklyn, pursuant to your duties? A. Yes, sir; I was.

Q. Will you tell the Court and jury where you were? A. I was in a position where I could observe the windows of studio or suite 505 at 252 Fulton Street.

Q. Now, I show you here Government's Exhibit 57 in evidence. (Counsel hands photograph to witness.) Do you recognize that picture? A. (Witness examines photograph.) Yes, sir.

Q. Are there two windows there marked with an X? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Were those the windows that you were observing? A. Yes, sir.

Q. Where was your observation post with relation to those windows? Was it above? A. It was some distance above.

I was on the twelfth floor of Hotel Touraine and these windows are on the fifth floor of that building.

(718) The Court: By "that building" you mean 252 Fulton Street. You don't mean the Touraine? The Witness: That's right, sir.

Neil D. Heiner, for Government—Direct.

By Mr. Tompkins:

Q. And you were keeping those windows under continual observation? A. Yes, sir.

Q. Will you tell us what you saw, if anything? A. Well, on the evening of May 23rd at about 10:45 P. M. I was watching the studio and I saw the lights go on—rather one light was turned on in the studio.

And I could see a male figure moving around in the room. From time to time it would pass in back of this light. There was a light suspended on a cord from the ceiling with a shield around it.

I could see that this man, he was unidentified, was middle-aged and was baldheaded. He had a fringe of gray hair around the edges.

He was wearing glasses.

And, as I said before, he showed himself only momentarily. My view was—my view of the entire room was obstructed except when he stood in front of the window.

The lights remained on, and at about one minute before midnight I saw this man, in back of the light, put (719) on a dark brown or dark gray summer straw hat, and it had a very bright white band. The band stood out.

And then, about a minute later, the lights went out—the single light went out.

Q. Could you describe his clothing at all? A. Yes. I could see that he had on a short sleeve shirt. It hit him about—oh, an inch above the elbow. It seemed to be light-colored blue.

He was wearing a tie. It was darker than—darker colored. I couldn't distinguish which color.

And, as I said before, he was wearing glasses.

I couldn't see his entire face because his head was down. In other words, he wasn't looking out the window so I could have a full front view of his face.

Neil D. Heiner, for Government—Direct.

Q. Did I understand you to say about midnight the light went out? A. Yes, sir. He was—

Q. What did you do after the light went out? A. I had radio communications with other agent personnel who were on the street in the area surrounding the studio.

When the light went out, I alerted the agent personnel in the street, told them that the lights had gone out.

And this information was given to them so that they could effect—

(720) Mr. Fraiman: I object, your Honor, to the reason why the information was given to them.

By Mr. Tompkins:

Q. Did you thereafter see this unidentified individual? A. No, sir. Not that night.

Q. Now, directing your attention to June 13, 1957, were you in the vicinity of 252 Fulton Street pursuant to your duties as a special agent of the Federal Bureau of Investigation? A. Yes, sir. I was in the same position.

Q. And what— A. And—

Q. What did you—tell us what you saw? A. At about 10 o'clock on the night of June 13th I observed the light in the studio go on again and the same individual was seen in the room.

Again I saw him only momentarily as he passed in back of the light. The same light was on, and at 11:50 I think—yes—11:50—

Q. Excuse me. This is all A. M. or P. M.? A. P. M. Close to midnight.

I observed this man putting on a hat very similar to the one I had seen on the previous night of May 23rd.

(721) He put this hat on and about a minute later the light was turned out.

And then at 11:54 P. M., walking toward my position—that would be southeast from 252 Fulton Street—an indi-

Neil D. Heiner, for Government—Cross.

vidual approached me and he was wearing a hat similar to the one I had observed on the unidentified man in Room 505 of 252 Fulton Street.

Q. Did you see him come out of 252 Fulton Street or if you didn't, where did you first see him? A. No, sir.

My view of the main entrance to 252 Fulton Street was obstructed.

I actually couldn't see the front door. However, at a point at most thirty to forty feet southeast from the main entrance I could see people walking on Fulton Street, and that is at the point I observed him.

Q. From the description you have given of this individual in the room and this—would you say it was the same individual? A. Yes, sir.

Q. Did you do anything after the individual passed from your view walking along Fulton Street? A. Well, when that light went out I, again, notified agent personnel and observed these agents commence to (722) conduct surveillance of this unknown man.

Q. That is all you saw? A. Yes, sir.

The unidentified man passed beneath—directly beneath me and I could see no more.

Mr. Tompkins: No further questions, your Honor.

Mr. Fraiman: A few questions, your Honor.

Cross examination by Mr. Fraiman:

Q. Agent Heiner, this man whom you observed on both of these occasions, May 23rd and June 13th, did he behave in a furtive, suspicious manner in any way?

The Court: I hope the witness knows what you mean. I don't.

Mr. Tompkins: I am perfectly willing to let the witness answer the question.

Neil D. Heiner, for Government—Cross.

I don't either, your Honor.

Mr. Fraiman: I will rephrase the question, if I may, your Honor.

The Court: You have a right to ask him what he observed. Then you will have the right to ask whether what he observed him do impressed him as indicating anything.

Mr. Fraiman: I will rephrase it in that manner, (723) if I may.

By Mr. Fraiman:

Q. Did the witness' behavior on either of these two nights—

The Court: No.

What did you observe? Did you observe anything other than what you have stated?

The Witness: No, sir.

(724) By Mr. Fraiman:

Q. When this unidentified man on the second occasion came out into the street, did you see his face on the street?

A. No, sir. Not a full front view like I have of you.

Q. Did you see the face of the man in the room? A. No, sir.

Q. So that the only way you can say that the same person—say that the person on the street was the man in the room is by the clothing; is that right? They were dressed similarly? A. The view of the man I saw through the window was the same view I had of the person walking on the street.

And, from my viewpoint, the man on the street appeared to be identical with the man who I saw through the window.

Q. You were on the twelfth floor of the hotel? A. Yes, sir.

Neil D. Heiner, for Government—Re-direct.

Joseph C. McDonald, for Government—Direct.

Q. And it was night? A. Yes, sir.

Mr. Fraiman: No further questions.

Mr. Tompkins: One question, your Honor.

(725) *Re-direct examination by Mr. Tompkins:*

Q. Were you using binoculars? A. Yes, sir.

Q. Will you tell us the type? A. Well, they were ten-fifties. That means they have a power of ten magnification and the fifty designates the millimeter width across the front of the lens.

In other words, the front lens of the binoculars were fifty millimeters wide.

Q. And you were using binoculars on your observation through the windows? A. Yes.

Q. And, again, when he walked along the street? A. Yes.

Mr. Tompkins: No further questions.

(Witness excused.)

(726) JOSEPH C. McDONALD, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Tompkins:

Q. What is your address, Mr. McDonald? A. 675-B Shaler Boulevard, Ridgefield, New Jersey.

Q. By whom are you employed? A. Federal Bureau of Investigation.

Q. How long have you been so employed? A. Six years and nine months.

Joseph C. McDonald, for Government—Direct.

Q. Directing your attention to the night of May 24, 1957—

The Court: Are you a Special Agent?

The Witness: Yes, your Honor.

By Mr. Tompkins:

Q. Pursuant to your official duties were you in the vicinity of 252 Fulton Street? A. Yes, sir.

Q. Will you tell us where you were? A. I was sitting on a park bench directly across the street from 252 Fulton Street.

Q. Now, I have here—

The Court: Is this as to June 13th?

(727) Mr. Tompkins: No. This is the May 24th—

The Court: May 23?

Mr. Tompkins: May 23. The night of May 23, the morning of May 24th.

By Mr. Tompkins:

Q. Is that correct, Mr. McDonald? A. Yes, sir.

Q. This year, 1957:

I have here Government's Exhibit No. 58 in evidence. (Counsel hands photograph to witness.)

Is that the front entrance of 252 Fulton? A. (Witness examines photograph.) Yes, sir. It is. Right here is the entrance.

Q. From where you were sitting in the park, could you see that front entrance? A. Yes, sir.

Q. Thank you, sir.

Now, will you tell us what you saw, if anything?

The Court: Are we to have the approximate time?

Joseph C. McDonald, for Government—Direct.

By Mr. Tompkins:

Q. Were you sitting there about midnight? A. Yes, sir.

Q. Would you tell us what you saw, if anything? (728)

A. Shortly after midnight, it was 12.02 A. M., and at that time a man unknown to me, a white male left 252 Fulton Street, and he had on a dark summer type hat with about a two-inch white band, real white, and he had on a light tan colored coat and dark colored pants, and he was carrying a coat over his arm.

Q. Now, were you in radio contact with any other agents about that time? A. Prior to 12 o'clock I was.

Q. And as a result of a radio communication had you received—

The Court: Will you substitute "following" for "as a result"?

Mr. Tompkins: All right. "Following."

By Mr. Tompkins:

Q. Following your radio communication were you watching this doorway for any specific purpose? A. Yes, sir.

Q. And what was that purpose? A. I was waiting to follow anyone that came out that door.

Q. Now, you have described the individual that came out. What did you do? A. I followed him.

(729) He came out of the door and he made a right turn and walked up Fulton Street to Clinton, walked up Clinton Street to Montague, turned the corner of Montague and entered the BMT Subway—BMT Borough Hall Subway station.

Q. When you got into the Borough Hall Subway station, what did you do? A. The man had entered an elevator, and I entered the elevator with him.

Q. Now, at any time up to this present point while you were on the elevator with this unidentified individual, did

Joseph C. McDonald, for Government—Direct.

you get a look at his face? A. On the elevator I did, sir.

Q. Would you recognize that individual? A. Yes, sir.

Q. And is he present in court? A. Yes, sir.

Q. Would you point him out, please? A. He is sitting at the end of this table right here (indicating).

Mr. Tompkins: Is there any question in the defense's mind about the identification of the defendant?

Will you stipulate?

The Court: The answer is, "No!"

(730) Mr. Fraiman: No, your Honor.

Mr. Tompkins: The record will show that the witness singled out the defendant.

By Mr. Tompkins:

Q. Now, you descended in the elevator? A. Yes, sir.

Q. Then what did you do? A. This man walked down the steps to the platform and went onto the platform, and he walked the full length of the platform to the other end; and I walked up to ten yards behind him.

And there were quite a few people up at that end, so I stood in with the people and he turned around and he turned around and walked back past me, and then the train came in.

Q. By "this man," you are referring to the defendant? A. Yes, sir.

Q. Did you both get on the train? A. He entered the second last car and I entered the last car.

Q. What happened thereafter? A. I couldn't see him from where I was sitting, so at the next stop I looked out the door and he didn't get off; so (731) I took another seat and I could see him from this second seat I took.

And the train next went on to City Hall. It made a few stops before that, I don't know how many.

Q. Did you get off at City Hall? A. Yes, sir.

The defendant got off and I got off.

Joseph C. McDonald, for Government—Direct.

Q. What happened after that? A. And he went upstairs to Broadway and he walked north on Broadway to the southeast corner of Chambers and Broadway where he stood on the corner.

Q. What did you do? A. I went across the street in a doorway.

Q. What did he do next? A. He stood on the corner for a minute or two, and a bus came along,—Bus No. 2773—and he boarded this bus.

Q. What— A. And he—

Q. —did you do? A. I hailed some transportation and I followed the bus.

Q. Will you tell us what happened after that? A. The bus proceeded—he rode the bus to 27th and Broadway where he left the bus and he walked east on 27th Street to Fifth Avenue.

(732) And then he walked north on Fifth Avenue to 28th Street, and I last observed him as he turned right on 28th Street, walking east on 28th from Fifth.

Q. From Fifth Avenue and 28th Street to the corner where you last observed him, do you know how far it is to the entrance to the Hotel Latham? A. It is approximately thirty yards.

Q. And you did not see him after he turned the corner, is that correct? A. No, sir.

Mr. Tompkins: No further questions, your Honor.

Mr. Fraiman: I have no questions, your Honor.

The Court: No cross.

(Witness excused.)

Ronald B. Carlson, for Government—Direct.

(733) RONALD B. CARLSON, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Tompkins:

Q. Where do you live, Mr. Carlson? A. E291 Ordell Avenue, Paramus, New Jersey.

Q. By whom are you employed? A. The Federal Bureau of Investigation.

Q. And in what capacity? A. As a Special Agent.

Q. Now, directing your attention to the evening of June 13, 1957, were you in the vicinity of this building pursuant to your official duties? A. Yes, I was.

Q. Where were you? A. I was in the Post Office.

(734) Q. What were you doing after observing the address at 252 Fulton Street?

I have here Government's Exhibit 58 in evidence, is that the address that you are speaking about? A. That is correct.

Q. Could you see that doorway? A. Yes, sir.

Q. Now, about midnight or shortly before, what did you see? A. I saw an individual leave that address. He could be described best by his hat. He was wearing a dark gray hat with a white or light band. He was wearing a light sport coat and he left that address and went east on Fulton Street.

Q. On that evening were you in radio communication with other agents? A. Yes, sir.

Q. Now, could you describe the man more particularly as to weight and height? Were you able to observe that? A. No more than he was slender, that is the best I could observe.

Q. Any estimate as to age? A. None.

Fred A. Sowick, for Government—Direct.

Q. After the defendant came out—I beg your pardon (735)—after this individual came out of the building which way did he turn? Did you see him? A. Yes, he went east.

Q. And how far could you observe him going? A. About a half a block I could see him and then he disappeared.

Q. And you cannot identify this individual? A. No, I can't.

Mr. Tompkins: All right.

No further questions.

Mr. Fraiman: No questions.

The Court: It may help the jurors to understand the testimony of the witness who just left the stand.

When court adjourns today you can look out of the windows that face you and you will be able to see the premises 252 Fulton Street and also the Hotel Touraine.

(Witness excused.)

(736) FRED A. SOWICK, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Tompkins:

Q. Where do you live, Mr. Sowick? A. 5 Colby Lane, Keyport, New Jersey.

Q. By whom are you employed? A. Federal Bureau of Investigation.

Q. What are your duties? A. Investigating violations of the laws of the United States.

Q. Are you a special agent? A. I am a special agent.

Fred A. Sowick, for Government—Direct.

Q. Directing your attention to the night of June 13, 1957, were you in the vicinity of 252 Fulton Street, Brooklyn, pursuant to your official duties? A. Yes, I was.

Q. Will you tell the Court and jury where you were?

A. At 11:52 P. M. I was alerted that the lights were out at 252 Fulton Street, so I left my position in the Post Office Building here and hastened out into the street to effect a surveillance of an unknown man who was departing, who was presumably departing 252 Fulton Street.

(737) Q. Now, what did you do and what did you see? A. As soon as I left the building I ran up to Tillary Street and I was able to see this individual who was wearing a dark gray hat with a prominent white band.

Q. Had you previously ascertained that description? A. Yes, I did.

Q. Will you go on, please? A. This individual proceeded south on Fulton and south on Clinton to the BMT Subway station on Montague Street. He entered the subway station where he subsequently boarded a Fourth Avenue local train, Manhattan-bound local train.

Q. Do you know where he disembarked? A. He remained on the Fourth Avenue local train and continued to 28th Street in Manhattan and Fourth Avenue.

Q. Did he get off the train there? A. At 28th Street he disembarked and this was approximately 12:15 A. M. on June 14th.

Q. Did you get off? A. I got off at that stop.

Q. Will you tell us what you did? A. From there I followed him west on 28th Street and I observed him enter the Hotel Latham.

Q. Did you see him thereafter? (738) A. No, I didn't.

Q. Now, could you describe to the best of your recollection how he was dressed? A. He had this hat on, this straw hat, I believe it was straw, with a white band and he had a sport coat on. It was a gray sport jacket and light gray pants.

Nathan Wilson, for Government—Direct.

Q. Could you give us any description as to his height and weight? A. He was approximately five feet ten inches tall and 155 pounds, slender, fairly slender build.

Q. You did not see his face? A. Never saw his face.

Q. And after he entered the Hotel Latham, did you see him thereafter? A. Never saw him after.

Mr. Tompkins: No further questions.

Mr. Fraiman: I have no cross examination.

(Witness excused.)

(739) NATHAN WILSON, a witness called on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Featherstone:

Q. Mr. Wilson, in what business are you engaged? A. I am a hotel manager.

Q. Are you also the owner of the hotel? A. Part owner, yes, sir.

Q. What is the name of the hotel? A. Latham Hotel.

Q. Where is that located? A. Four East 28th Street.

(740) Where do you reside? A. At the hotel.

Q. On May 18, 1957, did an individual register at your hotel under the name of Martin Collins? A. He did.

Q. Do you recognize that individual as being present in this room? A. Yes, sir.

Q. Is that the individual who registered as Martin Collins (indicating)? A. That is right.

Mr. Featherstone: Is there any question as to the identification?

May the record show that Mr. Wilson has identified the defendant as the man who registered at the Hotel Latham as Martin Collins.

Nathan Wilson, for Government—Cross.

The Court: I think that that is what the record indicates, and as I understand it, there is no assertion by the defense counsel to the contrary.

Mr. Fraiman: That is correct.

Q. Have you brought with you, Mr. Wilson, the registration card used by Martin Collins and also your Hotel Latham billing card? A. I have.

(741) Q. Will you produce it, please? A. I have.

Q. I show you what has been marked as Government's Exhibit No. 76 for identification, and ask you whether these are records kept in the regular course of your business? A. They are.

Q. Are you the custodian of those records? A. I am, yes, sir.

Mr. Featherstone: I would like to offer Government's Exhibit No. 76 for identification into evidence at this time, your Honor.

Mr. Fraiman: No objection, your Honor.

Q. Mr. Wilson, on what date did the individual register in your hotel as Martin Collins check out? A. I think it is marked on the card. I think it is June 21st.

Q. 1957? A. That is right.

Q. Following the period when Collins checked out, did you give to Special Agents of the F. B. I. a consent to search the room, the room vacated by Mr. Collins? A. I did.

Q. What was the number of that room? (742) A. 839.

Mr. Featherstone: No further questions.

Cross examination by Mr. Fraiman:

Q. Do you recall, Mr. Wilson, the incidents that occurred on the morning of June 21st when Mr. Collins checked out of the hotel? A. Well, I remember I received a call from the —

Nathan Wilson, for Government—Cross.

Q. I merely asked you whether or not you did recall.

A. I did.

Q. Were you present? A. No, I was not.

Q. You were not present at the hotel at the time? A. No.

Q. I wonder if you could look at Government's Exhibit No. 76 in evidence, Mr. Wilson, and tell me first, what the price of Mr. Collins' room was? A. Four dollars a day.

Q. And how was that rental paid? A. Weekly.

Q. A weekly basis? A. That is right.

(743) Q. Do you recall on what date or can you tell from examining Government's Exhibit No. 76, on what day of the week the bill was paid? A. It was on a Saturday.

Q. So that every Saturday, Mr. Collins paid you 28.00? A. \$29.40.

Q. That would be including tax? A. That is right.

Q. Can you tell me from an examination of that card what the day preceding June 21st was? I believe that June 21st was a Friday. A. The 15th.

Q. Saturday, June 15th? A. That is right.

Q. And on that date did Mr. Collins pay you \$29.00? A. He paid me, yes.

Q. Was that for rental in advance? A. No.

Q. That was for the preceding week? A. That is right.

Q. When Mr. Collins was checked out of the hotel on June 21st, how much money was paid to the hotel? A. \$25.20.

(744) Q. Excuse me? A. \$25.20.

Q. That would entitle him to six days? A. That is right.

Q. At the hotel? A. That is right.

Q. What time is the check-out time for guests at your hotel? A. Three o'clock, any time up until three o'clock.

Q. In the afternoon? A. That is right.

Q. So that if a guest paid for a particular day, he is entitled to remain in the room until three o'clock? A. Not

Nathan Wilson, for Government—Re-direct.

if the key is turned in and the baggage is taken out, the room is given up.

Q. But if the key is not turned in and the baggage is not given up, he is entitled to remain in the room until three o'clock in the afternoon? A. That is right.

Q. And you were paid for room 839, Mr. Collins' room, through June 21st? Is that right, sir? A. No, through the 20th, up until three o'clock on the 21st.

Q. Up until three o'clock, he was entitled to remain (745) in the room until three P. M. on June 21st? A. That is right.

Q. And the consent that you gave the F. B. I. to search his room occurred at what time? A. I think about nine o'clock in the morning.

Q. Nine o'clock in the morning? A. I believe so.

Mr. Fraiman: Thank you. I have no further questions, your Honor.

The Court: Now, at what hour on June 21st did the actual checking out occur?

The Witness: At about three o'clock.

Well, the baggage was taken out earlier in the day.

The Court: That is what I am trying to find out.

The Witness: That is before nine o'clock, before I came down.

The Court: The baggage was taken out before nine o'clock, is that it?

The Witness: That is right.

The Court: So that between nine A. M. and three P. M. the room was untenanted?

The Witness: That is right.

(746) *Re-direct examination by Mr. Featherstone:*

Q. Were you in the hotel building at the time Mr. Martin Collins checked out of the hotel? A. Yes, I was in my room.

Nathan Wilson, for Government—Re-cross.

Robert E. Schoenenberger, for Government—Direct.

Mr. Featherstone: Has your Honor finished asking the witness questions?

The Court: Yes. I have nothing to add.

Q. After Martin Collins checked out of the hotel, out of Room 839, was his room available for rental to someone else? A. In the afternoon it was, yes.

Q. Immediately after he checked out, could you have rented that room to somebody else? A. We could have, yes; but we didn't.

Mr. Fraiman: May I ask one further question, your Honor?

The Court: Surely.

Re-cross examination by Mr. Fraiman:

Q. Mr. Wilson, do you know whether Mr. Collins checked out of his hotel room voluntarily? A. I don't think he did.

Mr. Fraiman: Thank you.

(747) ROBERT E. SCHOENENBERGER, a witness called on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Maroney:

Q. Would you state your occupation, please? A. I am an investigator with the Immigration & Naturalization Service.

Robert E. Schoenenberger, for Government—Direct.

Q. Where are you stationed? A. Washington, D. C.

Q. Were you so employed on June 21, 1957? A. Yes, sir.

Q. Directing your attention to that date, did you in the course of your official duties—

The Court: Just a moment.

I want to be sure that we are right about that.

Mr. Schoenenberger was sworn in the course of the hearing, but he wasn't sworn for the purpose of the trial.

The Clerk: That is right. That is why I re-swore him, your Honor.

(748) The Court: But you did re-swear him?

The Clerk: Yes, sir.

The Court: Thank you.

By Mr. Maroney:

Q. Did you on the morning of June 21st, 1957, in the course of your duties have occasion to go to Room 839 of the Latham Hotel? A. Yes, sir.

Q. Do you recall about what time you arrived at Room 839? A. Approximately 7:30 A. M.

Q. Did you enter the room? A. Yes, sir.

Q. Do you know who the occupant of the room was, the rental occupant? A. Yes, sir.

Q. Do you see that person in the court room this afternoon? A. Yes, sir.

Q. Would you indicate— A. The gentleman sitting at the end of that table (indicating).

The Court: Do you identify the defendant as the occupant of that room?

(749) The Witness: Yes, sir.

Robert E. Schoenenberger, for Government—Direct.

By Mr. Maroney:

Q. Now, you said you entered the room, is that correct? A. That is correct.

Q. Were you in the company of other Immigration & Naturalization officers? A. I was.

Q. Now, on that occasion did you have occasion to search the effects of the defendant which were in the Hotel Latham? A. Yes.

Q. While you were in the room—first of all, would you state for how long a period you were in that room that morning? A. Approximately one hour.

Q. So that you left about eighty-thirty? A. Yes, sir.

Q. Was the defendant in the room during that entire hour? A. He was.

Q. While you were in the room of the defendant, also, were the personal effects of the defendant packed? A. They were.

(750) Q. Did the defendant take any part in packing his effects? A. Yes, he did.

Q. During the packing of the personal effects of the defendant, did you observe the defendant discard any item? A. Yes, I did.

Q. Would you tell us about that, please? A. He was allowed to choose what he took with him and what he discarded. He discarded some Kleenex, he left some painter's supplies sitting on the window sill, he discarded a few pencils.

Q. Where did he discard the pencils? A. Into the wastebasket.

Q. And what kind of pencils were they? A. Ordinary lead pencils.

Q. An ordinary wooden lead pencil? A. Yes.

Q. Or several lead pencils? A. Several.

Robert E. Schoenenberger, for Government—Direct.

Q. Now, aside from those items which he either discarded into the wastebasket, or left around, was everything else taken from the room? A. Yes, sir.

Q. While you were in the room, did you observe a (751) radio? A. I did.

Q. Would you describe the radio, if you will? A. It was a table model, Hallicrafter, short-wave radio.

Q. Did it have an aerial of any kind? A. Yes.

Q. Would you describe that, please? A. The aerial went from the radio around the wall of the room, the full length of it into the adjoining bathroom and out the bathroom window.

Q. The aerial was an ordinary wire aerial? A. It was a green covered copper wire.

Q. How long did the packing of the defendant's effects take? A. Practically the entire time I was there in the room.

Q. Practically the entire hour? A. Yes, sir.

Q. During the packing process, first of all, preliminarily, was one of the I. N. S. officers with you on that occasion, Mr. Edward Boyle? A. He was.

Q. During the packing process did you hear Mr. Boyle ask a question of the defendant as to who is Goldfus? A. I did.

(752) Q. Do you recall what Mr. Boyle said? A. He indicated that he was Goldfus.

Q. Do you recall the question that Mr. Boyle asked the defendant? A. "Who is Goldfus," I believe he said.

Q. Did the defendant answer? A. He said I.

Q. He said I am? A. Yes.

Q. Prior to that question by Mr. Boyle had the defendant identified himself to you and the other Immigration officers by any name? A. Not to my knowledge.

Q. Now, during that time that the defendant's effects were being packed in the room, did the defendant at any

Robert E. Schoenenberger, for Government—Direct.

time take three documents and attempt to do anything with them?

Mr. Fraiman: Objection on the form of the question.

The Court: Did you observe the defendant do anything that you haven't told us about?

The Witness: Yes, sir, I did, your Honor.

The Court: Will you state what it was?

The Witness: In rearranging and repacking his (753) large bag, I observed him attempt to slip three pieces of paper into his right coat sleeve.

Q. I show you what was or has been marked as Government's Exhibit No. 77 for identification and ask you if you can identify that, Mr. Schoenenberger? A. I can.

Q. Would you state where you first saw it? A. I first noticed this piece of paper as the defendant—with two other pieces of paper, attempted to put them up his right sleeve.

Q. And what did you do when you observed the defendant placing that paper up his sleeve? A. I picked up his right hand and removed the papers from his sleeve.

Q. Did you then take possession of the document? A. Yes.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit No. 77 for identification.

Mr. Fraiman: May I examine on the *voir dire* with respect to the admissibility of this document?

The Court: Yes.

Mr. Fraiman: Did you have a search warrant, Mr. Schoenenberger, when you entered Room 839 on the morning (754) of June 21st?

Mr. Maroney: Objection, your Honor.

Robert E. Schoenenberger, for Government—Direct.

The Court: Sustained.

That isn't *voir dire*, my friend.

Mr. Fraiman: Your Honor, on the basis—

The Court: That is not *voir dire*.

Mr. Fraiman: My objection—

The Court: Make your objection.

Mr. Fraiman: My objection is that the document which the Government has offered as 77 for identification is inadmissible on the ground that it was illegally seized in an unlawful search in violation of the Fourth Amendment of the Constitution.

The Court: You agree, if the Court is going to be consistent with itself, it is bound to follow its ruling already made on this subject?

Mr. Fraiman: I do, your Honor; but I feel I should renew the objection at this time.

The Court: Very good.

Objection overruled.

Mr. Maroney: At this time, if your Honor please, I propose to identify the exhibit or to explain the exhibit.

Exhibit No. 77 in evidence is a piece of graph (755) paper containing eight rows of five digit numbers, five digit groups of numbers with ten groups of numbers in each line, or in each row, with the exception of the bottom row, which contains two less groups of numbers.

(756) Q. Mr. Schoenenberger, I show you Government's Exhibit 78 for identification and ask you if you can identify that. A. Yes, I can.

Q. Where did you first—

The Court: What is it?

The Witness: It is a certificate of birth.

The Court: You say you can identify it. Did you ever see it before?

Robert E. Schoenenberger, for Government—Direct.

The Witness: Yes, your Honor.

The Court: When and where?

The Witness: In the hotel room of the defendant at the time his personal effects were being packed; sir.

The Court: I am sorry, I have got to lead you. Is this one of the three papers that you testified about?

The Witness: No, your Honor.

The Court: Thank you.

Q. But this was among the personal effects of the defendant? A. That is correct.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit 78 for (757) identification.

Mr. Fraiman: My objection is the same with respect to this document as the other documents taken at the hotel.

The Court: Objection overruled.

Mr. Maroney: If your Honor please, reading Government's Exhibit 78 in evidence, it is a certificate of birth, Department of Health, Bureau of Records and Statistics, City of New York.

This is to certify that Martin Collins, sex, male, was born in the City of New York on July 2, 1897, according to birth record No. 32024, filed in the Manhattan office of this bureau on July 15, 1897 in witness whereof, the seal of the Department of Health of the City of New York has been affixed hereto, this 11th day of April, 1947, and then containing signatures and including a signature which appears to be, Dorothy Adams.

The Court: Well, evidently that is an official signature, is it?

Mr. Maroney: It purports to be one.

Robert E. Schoenenberger, for Government—Direct.

The Court: Dorothy Adams, acting commissioner
o^r—

Mr. Maroney: Sidney M. Norton, acting City
(758)—City Registrar by Dorothy Adams.

The Court: All right.

Q. Mr. Schoenenberger, I show you what has been marked as Government's Exhibit 79 for identification and ask if you can identify that. A. Yes, I can.

Q. What is it, without stating its contents? A. It is a certificate of birth among the personal effects of the defendant.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit 79 for identification.

Mr. Fraiman: May I have the witness' last answer read, your Honor? I didn't hear it.

The Court: I didn't hear you.

Mr. Fraiman: May I have the witness' last answer read? I didn't hear it.

The Court: He said, it was a certificate of birth that he found among the defendant's effects.

Isn't that what you said?

The Witness: That is correct, your Honor.

Mr. Fraiman: May I inquire if that was at the Hotel Latham?

The Court: I think he is talking about the (759) occasion that he heretofore explained.

You are speaking of the Hotel Latham, aren't you?

The Witness: I believe I saw that certificate later after I left the Hotel Latham.

Mr. Fraiman: Might I ask one question on the *voir dire*, your Honor?

The Court: Yes.

Robert E. Schoenenberger, for Government—Direct.

Mr. Fraiman: Did you take this document from the Hotel Latham, Mr. Schoenenberger?

The Witness: It accompanied the defendant and me from the Hotel Latham, yes, sir. It was among his personal effects.

Mr. Fraiman: It was in your custody, was it not?

The Witness: I would say so, yes.

Mr. Fraiman: The same objection to this document as to Government's Exhibit 77.

The Court: Same ruling.

Now, will you state for the record the name that appears on the second birth certificate?

Mr. Maroney: Yes, sir. Government's Exhibit 79 in evidence is a birth certificate for Emil Robert Goldfus, issued by the State of New York, City of New York, and the number of the certificate is (760) 33318, and it reflects that Emil Robert Goldfus was born on August 2, 1902 at 122 East—it appears to be 82nd Street, and then there is also information as to the father's name, residence, mother's name and information of that nature.

Q. I show you Government's Exhibit 80 and 81 for identification and ask if you can identify those two documents. A. Yes, sir, I can.

Q. Did you see those at the Hotel Latham or did you see them after leaving the hotel room for the first time? A. I believe after leaving the hotel room.

Q. When you left the hotel room on that morning, were you accompanied by the defendant? A. I was.

Q. And where did you go? A. To the New York headquarters of the Immigration and Naturalization Service.

Q. Did you take with you the personal possessions of the defendant which had been packed? A. I did.

Q. And were these two documents which you have stated you have seen before among the effects of the defendant? A. Yes, sir.

Robert E. Schoenenberger, for Government—Direct.

(761) Mr. Maroney: At this time, if your Honor please, we—

The Court: We are still in the dark as to what they are.

Q. Would you describe the two documents, Mr. Schoenenberger, without giving the contents?

The Court: What is Exhibit 80 for identification?

The Witness: It is an international certificate of vaccination.

The Court: Dated?

The Witness: May 23, 1957, I believe.

The Court: May 23, 1957?

The Witness: Yes, sir.

The Court: By whom issued?

The Witness: Commissioner of Health, City of New York.

The Court: And 81 is what?

The Witness: It is an envelope containing a bank book from the East River Savings Bank in the name of E. R. Goldfus.

The Court: Goldfus?

The Witness: Yes, sir, your Honor.

The Court: You said East River Savings?

(762) The Witness: Yes, sir.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Exhibit 80 and Exhibit 81 for identification into evidence.

Mr. Fraiman: Could I ask one question on the *voir dire*?

The Court: On the *voir dire*?

Mr. Fraiman: Yes, sir.

Did Exhibit 80 and 81 come from Room 839 of the Hotel Latham, Mr. Schoenenberger?

The Court: Did they come from what?

Mr. Fraiman: Room 839 of the Hotel Latham.

The Court: He has testified that they were in the effects of the defendant and that the defendant

Robert E. Schoenenberger, for Government—Direct.

accompanied the witness to headquarters. He has told you that.

Mr. Fraiman: The same objection, your Honor.

The Court: Same ruling.

Mr. Maroney: Exhibit 80 in evidence, international certificate of vaccination, issued to Martin Collins, whose address is reflected as 4 East 28th Street, New York City 16, New York, and the vaccination, the certificate of vaccination also reflects that Mr. Collins, whose date of birth is set forth (763) as July 15, 1897, was vaccinated on May 21, 1957, by Dr. Samuel F. Groopman.

Exhibit 81 in evidence is a bank book of East River Savings Bank.

The Court: Do you want to state the account number?

Mr. Maroney: Yes, sir.

The account number is 255,516.

The owner of the account is Mr. E. R. Goldfus.

The Court: What is the earliest date—first date, first entry in the book?

Mr. Maroney: June 12, 1950.

The Court: June 12, 1950, first—

Mr. Maroney: Yes, your Honor.

The Court: That is Goldfus?

Mr. Maroney: That is correct, sir.

The Court: And what is the latest date of deposit or entry—withdrawal or deposit?

Mr. Maroney: The latest entry is April 5, 1957 with a deposit of \$50, bringing the balance to \$1,386.22.

The Court: You said that was April 5, 1957?

Mr. Maroney: Yes, sir.

The Court: And that was the Goldfus account?

(764) Mr. Maroney: Yes, your Honor, that is correct.

No further questions..

Robert E. Schoenenberger, for Government—Cross.

Cross examination by Mr. Fraiman:

Q. Mr. Schoenenberger, when you made this search and arrest of the defendant on June 21st at the Hotel Latham, did you have a search warrant, sir?

Mr. Maroney: Objection, your Honor.

I don't think that is material to this proceeding.

The Court: Well, the way I understand counsel's purpose, he was to buttress the legal argument he makes.

I am just wondering if he is quite accurate.

There was a warrant—

Mr. Fraiman: I am coming to that.

The Court: I think you are there. Ask him under what kind of warrant he acted.

Q. Under what kind of warrant did you act when you made that arrest of the defendant on June 21st? A. A warrant of arrest issued by the Immigration and Naturalization Service.

Q. What did that warrant charge the defendant with, sir? (765) A. Deportability.

The Court: Well, now, that is a result. It contains allegations of fact, doesn't it?

The Witness: That is right.

The Court: Namely, that he was illegally in the country?

The Witness: Yes, sir.

The Court: And it contains other allegations, doesn't it?

The Witness: That is correct.

The Court: Now, if you wish the thing done, it must be done completely. I haven't the motion papers here. Maybe somebody has.

Give the witness the copy of the papers so that he can state what the allegations of the warrant were.

Robert E. Schoenenberger, for Government—Cross.

(766) Mr. Fraiman: I should like to do that, your Honor.

If the Government has a copy I should like to borrow that.

The Court: Defendant's Exhibit F for identification—

Mr. Fraiman: We have two exhibits, your Honor.

Q. I show you Defendant's Exhibit F for identification and G for identification, Mr. Schoenenberger, and ask you if you can tell the Court and jury what those are, please. A. G is an order to show cause and notice of hearing in deportation proceedings charging that the defendant is a native of Russia, national of the U. S. S. R. Exhibit F is a warrant of arrest for alien.

The Court: That warrant of arrest contains certain allegations, does it?

Or am I mistaken about that?

The Witness: It does, that the defendant entered this country from an unknown point in Canada and is in the United States in violation of the Immigration laws, and is therefore liable to be taken into custody as authorized by Section 242 of the Immigration and Nationality Act.

Mr. Fraiman: Was it pursuant to those documents (767) that you arrested the defendant on June 21st and searched his premises?

The Witness: That is correct.

Mr. Fraiman: I offer Defendant's Exhibit No. F and G into evidence, your Honor.

Mr. Maroney: No objection, your Honor.

The Court: Received.

No objection.

The Clerk: They want to substitute copies, your Honor.

Robert E. Schoenenberger, for Government—Cross.

Mr. Maroney: That was the original we had, your Honor, and I understand that the Immigration people would like the original for their files.

The Court: I think that it could be or rather it could serve the defendant's purpose if it were to be noted, the correct copies of these two documents are attached to the formal part of the defendant's motion to suppress, and that they could be deemed in evidence as part of this record.

Mr. Fraiman: That would be satisfactory, your Honor.

The Court: So that we won't have to burden the record with the defendant's Exhibit F and G.

Mr. Fraiman: May I refer briefly to this be- (768) fore the jury, your Honor?

May I refer to what was deemed Defendant's Exhibit G?

The Court: Surely. It is in the record for all purposes.

Mr. Fraiman: Defendant's Exhibit G, ladies and gentlemen, is an order to show cause and notice of hearing in the matter of Martin Collins, Emil R. Goldfus, and it is addressed to Martin Collins, Hotel Latham, Four East 28th Street, and it says:

It appearing that you are in the United States in violation of law in that you are not a citizen or national of the United States; you are a native of Russia and a national of the Union of Soviet Socialist Republics; you last entered the United States at an unknown point across the boundary of Canada in 1949; you failed to notify the Attorney General of your address during January, 1956 and during January, 1957; you did not furnish notice of your address because you feared that by so doing you would disclose your illegal presence in the United States. And that you are subject to be taken into custody

Robert E. Schoenenberger, for Government—Cross.

and deported pursuant to the following provisions of law, Section 24-A, 5 of the Immigration and Nationality Act, in that you (769) have failed to furnish notification of your address in compliance with the provisions of Section 265—Skipping down, it is ordered that you appear for hearing before a special inquiry office of the Immigration and Naturalization Service of the United States Department of Justice at 70 Columbus Avenue, New York, New York on July 1st, 1957, at 2:00 P. M. and show cause why you should not be deported from the United States on the charges set forth above. Immigration & Naturalization Service, signed John Murff, Acting District Director of New York.

Q. Was a hearing held on July 1st, 1957 at 2:00 P. M. at 70 Columbus Avenue?

Mr. Maroney: Objection, your Honor. Immaterial.

The Court: Overruled.

A. No, I believe not, sir.

Q. As a matter of fact, at the time, July 1st, 1957, 2:00 P. M., the defendant was being held in the custody, in custody in Texas by the Immigration Authorities, was he not?

A. He was held in custody in Texas, I am not positive of that date—

Well, yes, he was on that date.

(770) Q. By the Immigration & Naturalization Service?

A. That is correct.

The Court: He was held in custody pursuant to the provisions of law; is that so?

The Witness: That is true, your Honor.

Robert E. Schoenenberger, ^Xfor Government—Re-direct.

Lydell Usher, for Government—Direct.

Re-direct examination by Mr. Maroney:

Q. Mr. Schoenenberger, do you know if a hearing was held in McAllen, Texas, following the arrest of the defendant on June 21, 1957? A. Yes, it was.

Q. And was that an immigration hearing? A. It was, sir.

Q. Was that a hearing on his deportability from the United States? A. Yes, sir.

Mr. Maroney: No further questions, your Honor.

Mr. Fraiman: I have no further questions, your Honor.

(Witness excused.)

(771) **LYDELL USHER**, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Featherstone:

Q. Mr. Usher, by whom are you employed? A. By the Department of Health, New York City.

Q. What is your position in the Department of Health? A. I am chief clerk of the Bureau of Records, 125 Worth Street.

Q. And of what records do you have custody, Mr. Usher? A. I have custody of the records of births, marriages, and deaths.

The Court: Do you call that vital statistics?

The Witness: Vital statistics; yes, sir.

By Mr. Featherstone:

Q. Mr. Usher, have you brought with you a copy of a birth certificate in the name of Emil Robert Goldfus? A. Yes.

Lydell Usher, for Government—Direct.

Q. Would you produce it, please? A. You said a birth certificate?

Mr. Featherstone: That is right.

(772) A. (Witness hands document to counsel.)

The Court: That first name, please?

Mr. Featherstone: Emil.

(Document referred to was marked Government's Exhibit No. 82, for identification.)

By Mr. Featherstone:

Q. Mr. Usher, I show you what has been marked Government's Exhibit No. 82, for identification, and ask you whether that is a true and genuine copy of the original document on file in your office (counsel hands document to witness)? A. (Witness examines document.)

Yes, it is; under the seal of the City of New York.

Mr. Featherstone: The Government would like to offer this in evidence.

The Court: Just for the record, is it correct that Exhibit No. 79, for identification, is Goldfus' certificate of birth or, at least, that is what it purports to be?

Mr. Fraiman: I have no objection, your Honor.

(Document heretofore marked Government's Exhibit No. 82 for identification was marked and received in evidence.)

(773) By Mr. Featherstone:

Q. Mr. Usher, have you brought with you—

The Court: While we are on the subject, do you wish to state anything to the jury as to whether there is a distinction in any respect between Exhibit No. 79 and Exhibit 82?

Lydell Usher, for Government—Direct.

Mr. Fraiman: They are identical as far as I can see, your Honor.

Mr. Featherstone: There is no distinction drawn there.

The Court: Thank you.

By Mr. Featherstone:

Q. Mr. Usher, have you brought with you a death certificate for Emil Goldfuss? A. Yes. I have a death certificate for Emil Goldfuss.

Q. Would you produce it, please? A. (Witness hands document to counsel.)

(Death certificate was marked Government's Exhibit No. 83, for identification.)

By Mr. Featherstone:

Q. Mr. Usher, I show you what has been marked Government's Exhibit No. 83, for identification, and ask you whether that is a true and genuine copy of the original on file in your office (counsel hands document to witness)? (774) A. (Witness examines document.)

It is a true and genuine copy of the one on file in our office under seal of the City of New York.

Mr. Featherstone: I would like to offer this in evidence.

The Court: So that we can know something about it in the record, in the first place, what is the date of the certificate?

Mr. Featherstone: October 11, 1957.

The Court: And what is the date of the death which it purports to relate to?

Mr. Featherstone: October 11, 1903. Or, October 9, excuse me.

The Court: October 9, 1903?

Mr. Featherstone: October 9, yes, 1903.

Lydell Usher, for Government—Direct.

The Court: And is the place of death given or address of the decedent?

Never mind. It is in evidence.

Mr. Featherstone: The address is 120 East 87th Street.

The Court: 120 East 87th?

Mr. Featherstone: That is right.

The Court: Manhattan?

Mr. Featherstone: In Manhattan.

(775) The Court: Just to relieve a little curiosity, will you please turn to Exhibit No. 79, and will you please state the date of the issuance of that certificate?

Mr. Featherstone: May 17, 1934.

The Court: Well as I can figure rapidly, that is about thirty-one years after the death.

Mr. Featherstone: It is a certification.

Mr. Tompkins: Your Honor, just a minute, sir. I think—

Mr. Maroney: I think the '34 date, your Honor, is the date that this certification was issued.

The Court: The date of the certification is '34. Is that it?

Mr. Featherstone: That is right.

The Court: And the point that I am making is that in '34, which was thirty-one years after the actual death, the birth is certified to, which indicates that there was no cross-references between births and deaths.

Mr. Fraiman: Your Honor, I think that this exhibit, Government's Exhibit No. 83 for identification, the last name is spelled G-O-L-D-F-U-S-S.

The Court: Isn't that the way it is spelled in (776) Exhibit No. 79?

Mr. Fraiman: I don't believe so, your Honor. I think it is one S. G-O-L-D-F-U-S in those other exhibits.

Lydell Usher, for Government—Direct.

The Court: That could be quite a material difference, couldn't it?

It might not refer to the same individuals at all.

Mr. Fraiman: Yes, your Honor. That is conceivable. The other, 79, refers to Emil Robert Goldfuss, with one S.

The death certificate refers to Emil Goldfuss, —no middle name, two S's.

The Court: Will you say that again?

Mr. Fraiman: Government's Exhibit No. 79 refers to Emil Robert Goldfuss.

The Court: One S?

Mr. Fraiman: G-O-L-D-F-U-S. Yes, your Honor. That is 79.

(777) Government's Exhibit 83, the death certificate, refers to an Emil, no middle name, Goldfuss, two S's.

The Court: Now we have got a bank account, haven't we?

Yes. What is Exhibit 81? What is the name of the depositor? How does he spell it?

Mr. Featherstone: There is other information in these two exhibits, which clarify the situation, your Honor.

The Court: Yes. One thing at a time.

How does the depositor spell his name? One S?

The Clerk: Yes.

The Court: We might as well get these things straight, gentlemen, while we are taking the testimony so as to avoid confusion on some other occasions.

Mr. Featherstone: Your Honor, Government's Exhibit 79, the child's mother is given as Helen Troutwein; and on Government's Exhibit 83 the deceased's mother is given as Helen Troutwein.

The father's name in both instances is given as Emil Goldfuss. The address on Exhibit—the resi-

Lydell Usher, for Government—Direct.

dence of the parents on Exhibit 79 is given as 120 East 87th Street.

(778) On Exhibit 83 the address given is 120 East 87th Street.

The birth place of both parents on Exhibit 79 is given as Germany:

On Exhibit 83 both parents are listed as having been born in Germany.

The Court: Thank you.

The Clerk: Is 83 in evidence?

Mr. Fraiman: I have no objection to the receipt of Exhibit 83.

(Document heretofore marked for identification Government's Exhibit No. 83 was marked and received in evidence.)

By Mr. Featherstone:

Q. Mr. Usher, have you brought with you record of birth number 32024 for the year 1897 indicating the birth of one Esther Wohman? A. I have, yes.

Q. Will you produce it, please? A. (Witness hands document to counsel.)

The Court: That name?

Mr. Featherstone: Esther W-O-H-M-A-N.

(Record of birth No. 32024 was marked Government's Exhibit No. 84, for identification.)

(779) Q. I show you what has been marked Government's Exhibit 84 for identification and ask you if this is a true and genuine copy of the original on file in your office (counsel hands document to witness). A. (Witness examines document.)

Yes, it is a true copy of the original in our office under seal.

The Court: What was the date of that purported birth?

Lydell Usher, for Government—Direct.

Mr. Featherstone: August 1st.

The Court: August 1st?

Mr. Featherstone: 1897, I believe. 1897, that is right.

The Government wishes to offer Exhibit 84, for identification, in evidence.

Mr. Fraiman: I presume, your Honor, the Government will connect this up somehow.

The Court: I don't think they would take the trouble to bring it here except for what they believe to be a good reason.

Mr. Fraiman: On that assumption I have no objection to its receipt in evidence.

(Document heretofore marked Government's Exhibit 84 for identification was marked and received in (780) evidence.)

Mr. Featherstone: Your Honor, Government's Exhibit 78, purported birth certificate in the name of Martin Collins, is identified as birth record No. 32024.

Government's Exhibit 84, which has been produced by Mr. Usher, is the official birth record 32024, and that certificate refers to one Esther Wohman.

The Court: Is this a convenient place to suspend or isn't it?

Mr. Featherstone: Just a couple of more questions.

The Court: All right.

By Mr. Featherstone:

Q. Mr. Usher, are you acquainted with Dorothy Adams?

A. Yes, I am.

Q. Will you tell us her duties? A. At the present time she is in charge of our vault which maintains all of the records for the Borough of Manhattan.

Lydell Usher, for Government—Direct.

At one time she, away back about five years ago and maybe more, she was not in charge. Somebody else was but she was in charge of writing handwritten certificates.

The Department of Health issues two types: photostatic (781) copies, which are facsimile of the record as we have it, and a handwritten copy which we technically call 84-H's, that are made when photostatic copies are not necessary. It is a briefer copy but doesn't have all of the information.

Q. Her signature appears on birth certificates, is that right? A. Her signature at that time appeared on birth certificates, yes.

Q. Did she hold this position for some period of time?

A. Yes. Exactly I cannot say, but I will make an estimate of about—maybe four years she did that work.

Q. Have you ever seen Dorothy Adams in the act of writing? A. Yes, I have.

Q. Have you seen her write her signature? A. Yes, I have.

(Samples of handwriting of Dorothy Adams were marked Government's Exhibit 85 for identification.)

By Mr. Featherstone:

Q. Mr. Usher, I show you what has been marked Government's Exhibit 85 for identification and ask you whether these represent samples of the handwriting of (782) Dorothy Adams (counsel hands document to witness). A. (Witness examines document.)

Yes. I recognize these as samples of her handwriting.

Mr. Featherstone: The Government would like to offer Government's Exhibit 85 for identification in evidence.

Mr. Fraiman: No objection, your Honor, to it as a handwriting sample on the assumption that the contents are not offered in evidence but merely as a sample of her handwriting.

Lydell Usher, for Government—Direct.

Mr. Featherstone: That is right, merely as a sample.

(Document previously marked Government's Exhibit 85 for identification was received and marked in evidence.)

By Mr. Featherstone:

Q. Mr. Usher, have you conducted a search in an effort to discover a record of birth for one Martin Collins alleged to have been born in the year 1897 in New York? A. Yes, we did.

Q. Have you found such a record? A. No. We have not found such a record.

Mr. Featherstone: No further questions.

The Court: That was 1907, was it?

(783) The Clerk: 1897.

The Court: Well, are you able to state where it was that he is purported to have seen the light of day in 1897?

Your gentlemen are all too young to know that that was about the time when the greatest city came into existence.

Now, do you know the answer to my question?

Mr. Featherstone: The Borough of Manhattan.

The Court: The Borough of Manhattan?

Mr. Featherstone: That is right.

The Court: Then I think you ought to ask the witness if his office would be in possession of all vital statistics pertaining to the now Borough of Manhattan, the old city of New York for the year 1897.

By Mr. Featherstone:

Q. Is your office in possession of such records, Mr. Usher? A. Yes. Prior to the amalgamation of the five boroughs in 1898, Manhattan and Bronx was considered as

Sealing of Documents.

one borough and Manhattan—the Manhattan office had records all the way back to 1847 and part of '48, with a skip to 1853, and from 1853 up to the present we have the records (784) for 18—for Bronx and Manhattan except those who were not recorded due to the delinquency of the doctor or medical attendant at the time.

The Court: Thank you.

Any cross?

Mr. Fraiman: I have no cross examination.

(786) Mr. Tompkins: Your Honor, the Government would like to have the F. B. I. agent's notes which your Honor examined in chambers in the presence of counsel sealed and made part of the record.

The Court: That first bundle or bale of about—

Mr. Tompkins: It was a large number. It is about a box full.

The Court: I don't suppose Mr. Donovan objects to sealing them?

(787) Mr. Donovan: No, sir, not at all, your Honor.

The Court: Who is going to take charge of them?

Mr. Fraiman: We have no objection, your Honor, to having them remain in the custody of the Government.

The Court: I suppose you could cover it, Mr. Tompkins, by giving a little memorandum in the nature of a receipt that the contents of this box or these boxes are sealed by consent and are to remain in the custody of the Attorney General, and are to be accessible for any purpose in connection with this case?

Sealing of Documents.

Mr. Tompkins: That would be satisfactory, your Honor, and we would also like to include the copies of the statements—Rhodes' statements which we furnished to the defense, together with the excisions.

The Court: Say that again.

Mr. Tompkins: The copies of Rhodes' statements—or the statements of Rhodes given to the F. B. I. and the Army, which were made available to the defense.

The Court: And which were the subject of the consultation held yesterday morning.

(788) Mr. Tompkins: That is correct, your Honor. Together with the excisions which were made. In other words, your Honor, the copies without being excised were made available to the defense.

When they were declassified yesterday afternoon—

The Court: That was by order of the Army that they were declassified?

Mr. Tompkins: The Army declassified them when the excisions were made.

In other words, those three small portions were cut out.

The Court: Physically removed?

Mr. Tompkins: Physically removed.

The defense had the statements without being excised but they were declassified yesterday afternoon when they were excised.

The Court: That is, the declassification did not extend to the matters which were physically removed?

Mr. Tompkins: That is correct, and we would like to have the statements sealed and made part of the record, and we would like to have the excisions also sealed and made part of the record.

(789) The Court: So, for possible future examination, the statements in their original forms will be subject to examination.

Is that it?

Sealing of Documents.

Mr. Tompkins: That is correct, in their entirety. That is correct, sir.

Mr. Donovan: I would have no objection to that, your Honor, except that it is understood that the excised material is still classified, isn't it?

Mr. Tompkins: The statements with the excised material were classified.

Without the excised material, they were declassified, but for any future purpose we would like them sealed and made part of the record.

Mr. Donovan: We would have no objection to that.

The Court: And you will execute something in the nature of a receipt or memorandum so that Mr. Donovan will have a record of the entire situation?

Mr. Tompkins: I will, your Honor.

Mr. Fraiman: Your Honor, so long as we are having all these records—these statements—made (790) part of the record, we also include Hayhanen's Grand Jury minutes, all the records that have been used in the trial as part of the sealed record—under seal the same as these records.

The Court: I suppose there would be no objection to that, would there?

Mr. Tompkins: The Government has absolutely no objection, your Honor.

The Government wouldn't have any objection to Sergeant Rhodes' testimony made part of the record.

The Government has nothing to hide. We are happy. I think your Honor has already found no inconsistency in the Grand Jury testimony, between the Hayhanen testimony in court, and the Grand Jury minutes.

The Court: I didn't see any. It could have been a little more detailed before the Grand Jury than it was in court, but I found nothing—

Mr. Tompkins: I agree, sir.

Transcript of Texas Hearing.

The Court: —that was inconsistent or contradictory in his testimony before the Grand Jury as compared with his testimony in the trial.

Mr. Tompkins: I think the Grand Jury present-
(791) ation in any of these cases is always much briefer.

The Court: Then, with this understanding, you gentlemen will take whatever steps are necessary. There is nothing further you are looking to the Court for in this connection?

Mr. Tompkins: Not a bit.

Do you want Sergeant Rhodes' Grand Jury minutes included?

Mr. Fraiman: No. We made no request to see them.

Mr. Tompkins: Fine.

The Court: I doubt if the disclosures of Rhodes before the Grand Jury were as complete as they were in court.

Mr. Tompkins: It was pretty complete, your Honor.

The Court: It was?

Mr. Tompkins: Yes, sir.

The Court: If in the future he receives a Medal of Honor or decoration, will you let me know about it?

(Whereupon the discussion at side-bar was concluded and the following proceedings were had within the hearing of the jury:)

(792) Mr. Maroney: Your Honor, at this time the Government offers in evidence the transcript of an Immigration & Naturalization Service hearing held June 27, 1957, counsel for the defendant having agreed that if the stenographer who made the tran-

Transcript of Texas Hearing.

scription, Minnie B. Hester, were called as a witness for the Government; she would testify that this is a true and accurate transcript of what transpired at the hearing, and that the defendant was present at this hearing, and is referred to in the transcript as "The Respondent."

Mr. Donovan: There would be no objection, your Honor.

(Transcript of Immigration & Naturalization Service hearing June 27, 1957 was marked Government's Exhibit No. 86 and received in evidence.)

Mr. Maroney: Reading from Government's Exhibit No. 86 in evidence, this is a transcript headed, "United States Department of Justice, Immigration & Naturalization Service, Hidalgo, Texas.

"Record of hearing.

"Date: June 27, 1957.

"Time: Ten A. M.

"Place: Alien detention facility, McAllen, (793) Texas.

"Special Inquiry Officer: James A. Winters.

"Examining officer: Vincent A. Schiano.

"Hearing stenographer: Minnie B. Hester.

"Respondent: Rudolf Ivanovitch Abel, alias Martin Collins, alias Emil R. Goldfus.

"Respondent's representative or counsel: Morris Atlas, Attorney at Law, Counsel; Robert Schwarz, Attorney at Law, Associate Counsel, of the firm Stafford, Atlas & Spilman, McAllen, Texas."

Now, then, reading—skipping part of the inquiry which begins on page one and going over to page two of the transcript:

"Special Inquiry Officer to Respondent:"—Respondent being the defendant, Abel, in this case.

"I have before me an order to show cause and notice of hearing dated June 20, 1957, addressed

Transcript of Texas Hearing.

to Martin Collins at Hotel Latham, New York, New York, which indicates that it was served in person on June 21, 1957. Were you served with a copy of this order to show cause?

"Answer: Yes, sir.

"What is your true and correct name?

"My true and correct name is Rudolf Ivanovitch (794) Abel.

"Question: Have you also been known as Martin Collins or Emil R. Goldfus?

"Answer: I have.

"Question: Now, this order to show cause and notice of hearing indicates that you have requested that a prompt hearing be held in your case and that you have waived your right to any additional time; is that correct, and is that your desire?

"Answer: Yes, sir."

Then the next question is by the Special Inquiry Officer to the attorney representing Mr. Abel:

"Question: Mr. Atlas, do you agree that due and timely notice has been given as to the date and place of this hearing?

"Answer: Yes, we do."

And then skipping the next two questions and answers, these are questions—or, this first question is to Mr. Abel:

"Now, I have here also a warrant of arrest dated **June 20, 1957, charging that Martin Collins, alias Emil R. Goldfus, appears to be in the United States in violation of the Immigration Laws, and this warrant of arrest indicates it was served on you (795) June 21, 1957, at 7:30 A. M.**

"Did you receive a copy of the warrant of arrest?

"Answer: I did."

And then skipping some questions to the attorney representing Mr. Abel and beginning on page four, the questions being from the Special Inquiry Officer to Mr. Abel:

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"Question: Mr. Goldfus, the order to show cause and notice of hearing alleges first you are not a citizen or national of the United States.

"Do you admit or do you deny that allegation?

"Answer: I admit it.

"Question: The second allegation, you are a native of Russia and a national of the Union of Soviet Socialist Republics.

"Do you admit that allegation is true or do you deny it?

"Answer: I admit it.

"Question: The third allegation, you last entered the United States at an unknown point across the boundary from Canada in 1949.

"Do you admit or do you deny that allegation?

"Answer: I do not deny that allegation but I (796) will correct it by saying it was in 1948.

"Question: Is it your testimony, then, that you admit that you last entered the United States at an unknown point across the boundary from Canada, but that you entered in 1948 rather than in 1949?

"Answer: Yes, sir.

"Question: Now, the fourth allegation, you failed to notify the Attorney General of your address during January, 1956 and during January, 1957.

"Do you admit or do you deny that allegation?

"Answer: I admit it.

"Question: Now, the fifth allegation, you did not furnish notice of your address because you feared that by so doing you would disclose your illegal presence in the United States.

"Do you admit or do you deny that allegation?

"Answer: I admit that, too.

"Question: Now, the charge in the order to show cause and notice of hearing is that you are subject to deportation under Section 241 (a). (5) of the Immigration and Naturalization Act and that you

Transcript of Texas Hearing.

have failed to furnish notification of your address in compliance with the provisions of Section 265 and have not established that such failure was reasonably excusable or was not wilful.

"Do you admit your deportability from the United States on this charge?

"Answer: Yes."

(798) Mr. Fraiman: May we ask that the Government read the next three paragraphs which I believe qualify that last answer of the defendant?

Mr. Maroney: I will be glad to.

Immediately following what I have just read, the transcript reflects, counsel to Special Inquiry Officer; in other words, a question put by Mr. Abel's attorney to the Special Inquiry Officer—it is not a question, it is a statement:

"That is, of course, a legal conclusion being phrased partially in terms of a particular statute, a particular portion of the United States Code and that while the respondent is in a position to affirm or deny facts, he is not in a position to affirm or deny legal conclusions based upon the language in the Code and the respondent's attorneys object to questions based upon the workings in statutes, such as, Section 241A5 and suggest that it would be more advisable to question him with regard to the facts upon which legal conclusions can be made.

"In addition, respondent's attorneys request information with regard to whether or not this section is still Section 241A5 of the Immigration and Nationality Act according to the United States (799) Code annotated or whether same is now a different section of said act, all of which is requested for information purposes..

"Special Inquiry Officer to counsel: Mr. Atlas, Section 241A5 of the Immigration and Nationality Act is found in the codification in 8USCA1251A5."

James P. Kehoe, for Government—Direct.

Then going to page 6 there is a question from the Special Inquiry Officer to Mr. Abel:

"Q. Mr. Goldfus, the charge in this order to show cause and notice of hearing is that you are subject to deportation under Section 241A5 of the Immigration and Nationality Act in that you have failed to furnish notification of your address in compliance with the provisions of Section 265 and have not established that such failure was reasonably excusable or was not willful. Do you admit your deportability in this charge? A. I would say I accept deportation."

We have no further reading from the exhibit, your Honor.

(800) JAMES P. KEHOE, called as a witness in behalf of the Government, having been first duly sworn, testified as follows:

Direct examination by Mr. Palermo:

Q. Will you tell the Court and jury your occupation?

A. Special Agent of the Federal Bureau of Investigation.

Q. How long have you been so employed? A. Six and a half years.

Q. Directing your attention to June 21, 1957, could you tell us whether in the course of your official duties you were in the Hotel Latham in New York City? A. Yes, sir, I was.

Q. Did you have occasion at that time to be in the corridor of the hotel outside Room 839? A. Yes, I did.

Q. On that occasion did you have an opportunity to see the occupant of 839? A. Yes, I did.

Q. Could you tell us what the occupant was doing when you saw him? A. He was packing his bags.

Q. Did you see him after he packed the bags? A. Yes, sir, I did.

James P. Kehoe, for Government—Direct.

(801) Q. And would you tell us about that? A. Well, I believe it was about 7:30 A. M. when we first arrived there and about 8:30 A. M. I saw him leaving with his baggage.

Q. Leaving Room 839? A. Leaving Room 839.

Q. Do you see the occupant of 839 in the courtroom? A. Yes, sir, I do.

Q. Will you identify him? A. It is that gentleman over there, sir (indicating).

Mr. Palermo: Let the record show the witness identifies the defendant as the occupant of Room 839.

The Court: So agreed?

Mr. Fraiman: Yes, your Honor.

Q. After that, Mr. Kehoe, what did you then do? A. I proceeded to the room of Mr. Nat Wilson, the manager of the Hotel Latham and requested that he sign a consent to search and seize any property in 839.

Q. Subsequently did you proceed to Room 839? A. I did.

Q. And did you conduct a search? A. I did.

Q. What did you observe conducting your search? A. Magazines and sundry articles on the dresser and a (802) waste basket which was full nearly to the brim.

Q. In regard to the waste paper basket, did you seize any objects in the waste paper basket? A. Yes, sir. I seized all the objects in the waste paper basket.

Q. I show you what has been marked Government's Exhibit 87 for identification and ask you to identify and tell us what it is, if you can. A. It is one of the pencils which I seized from the waste paper basket.

Q. I now show you what has been marked Government's Exhibit 88 for identification and ask you if you can identify that. A. It is a block of wood in a casing what appears to be sand paper and this was another item which I seized from the waste paper basket.

James P. Kehoe, for Government—Direct.

Q. Following your seizure of these objects, did you give them to or forward them to the F. B. I. laboratory personnel? A. Yes, I did.

Mr. Palermo: At this time, your Honor, the Government will withhold the offering of Exhibits 87 and 88 for identification.

Q. Directing your attention to August 17, 1957, Mr. (803) Kehoe, did you—

The Court: August 17th?

Mr. Palermo: August 17th, your Honor.

Q. —did you have occasion on that date in the performance of your official duties to be present in a building located at 252 Fulton Street in Brooklyn? A. Yes, I did.

Q. Were you in possession of a legal search warrant, a warrant to search Room 509 in that building? A. Yes, I was.

Q. Did you proceed to Room 509 and conduct the search? A. I did.

Q. Will you tell us what you observed on that occasion? A. In the room I observed photographic equipment, such as a camera, film, and enlarger, various chemicals and trays, a densitometer, and rubber tanks.

Q. Did you observe anything else, sir? A. Yes, sir, I did. There was electronic equipment, approximately one hundred electronic tubes of various sizes, a transformer, a converter and other electronic equipment.

Q. And was there anything else? (804) A. Yes, sir, there was.

Q. What else? A. There were items such as hollow screws and flashlight batteries and other items which were used as containers, also maps.

The Court: What was that?

The Witness: Which were suitable to be used for containers.

James P. Kehoe, for Government—Direct.

There were also maps for Boston, Los Angeles, Chicago, New York City, and New Jersey.

Q. At that time did you seize any of the objects which you observed in the room? A. Yes, I did.

Q. I show you now what has been marked Government's Exhibit 89 for identification and ask you to identify that if you can. A. Yes. This is a canister containing film marked one roll, Eastman spectroscopic film, type 649GH.

Q. I show you now what has been marked Government's Exhibit 90 for identification and ask you if you can identify that. A. This is another item I seized, and it is two sheets of paper, containing five digit groups of numbers, ten columns of numbers to the page.

(805) Q. Can you tell us where you found that? A. I found it in a Kodak photographic book.

Q. Is this the Kodak photographic book, the book in which you found it? A. Yes, sir.

Q. I show you now what has been marked Government's Exhibit 32 for identification and ask you if you will observe that and identify that, if you can. A. Yes, sir. This is a piece of electronic equipment marked a trav electric converter which I seized at that time.

Q. I now ask you to identify or to observe Government's Exhibit 91 and 91-A for identification and identify them if you can. A. These are two screws which I seized at that time.

Mr. Palermo: At this time, your Honor, the Government offers in evidence Government's Exhibit 32 for identification, Government's Exhibit 89 for identification and Government's Exhibit 90 for identification.

Mr. Fraiman: We object to the admission of Government's Exhibits 32, 89 and 90 for identification on the ground that the search warrant, which was used on August 17, 1957, pursuant to which these (806) items were seized was obtained as a

James P. Kehoe, for Government—Direct.

result of information found at the Hotel Latham on June 21st.

In view of the fact that it is our contention that the search of the Hotel Latham on June 21st was a violation of the Fourth Amendment of the Constitution, it is our contention that any evidence thereby obtained could not be used to—as a basis for a subsequent search warrant and it is our contention that the search warrant of August 17th, at 252 Fulton Street, was based upon affidavits reflecting information obtained as a result of the June 21st search at the Hotel Latham.

We therefore contend that the search at Fulton Street was also in violation of the Fourth Amendment, and the evidence therefore is not admissible.

The Court: Does it appear in this record that the warrant, the search warrant of August 17th was based upon what you say it was?

Mr. Fraiman: I was going to, on cross examination, ask the Government to produce the search warrant and to make it a part of this record, so that the search warrant and the affidavits would be a part of this record.

I don't have copies at this time of the search (807) warrant and the affidavits.

I should like them made part of the record.

Mr. Palermo: Your Honor, copies of the search warrant and the affidavits which provided the basis for the search are on file in this district and I might add that neither the affidavits nor the search warrant refer whatever in any manner to any of the objects obtained as a result of this search at the Hotel Latham and therefore counsel's position is not well taken.

Mr. Fraiman: Of course, I can't argue this point until we have the search warrant. However, it is our information that there were two searches conducted

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at 252 Fulton Street; the one on August 17th was, I believe, the second one; and it is our contention that if the affidavits for the second search on Fulton Street were not based directly upon the Hotel Latham, they were based upon information obtained on the first search on Fulton Street, which in turn had affidavits based upon the Latham. At any rate, we believe that the record will speak for itself with respect to these affidavits, and we should like them, that is, the affidavits for the first search and the second search at Fulton Street (808) to be made a part of the record in this case.

Mr. Palermo: Your Honor, the Government would have no objection to referring to the affidavits and the search warrants which are on file in this district and making them part of the record.

I might also point out again in connection with the first or second search conducted that—at 252 Fulton Street—that there is no reference made—it does not provide the basis for the second search at 252 and I might also note that the affidavits for the second search at 252 Fulton was conducted subsequent to the indictment on August 7, 1957.

(809) The Court: Well, since the alleged basis of your objection is so open to question, it may be that you would be willing to withdraw the objection with the right to strike if you are so advised at a later stage of the trial.

Mr. Fraiman: My feeling, your Honor, once we have an opportunity to examine these affidavits, perhaps we would withdraw the objection.

May we leave the objection stand at this time?

Perhaps the evidence could be—

The Court: I don't regard the objection substantial on the present showing.

Mr. Fraiman: In view of that—

The Court: I can't sustain it on anything that you have said here this morning.

James P. Kehoe, for Government—Direct.

Mr. Fraiman: I realize you can't sustain it without examining the affidavits. Could we have the evidence admitted at this time subject to being stricken if we—

The Court: That is what I suggested three minutes ago.

That I reserve to you the right to strike if your argument as you have heretofore advanced later seems to be meritorious, and—

(810) Mr. Fraiman: That is satisfactory, your Honor.

The Court: Objection to 89, and 90—

Mr. Palermo: 32, 89 and 90, your Honor.

The Court: Objection overruled, reserving to the defense the right to renew the objection if it be so advised.

By Mr. Palermo:

Q. Now, Mr. Kehoe, I ask you to examine what has been marked Government's Exhibit No. 92 for identification, and tell us what that is, if you can? A. Sir, this is a flashlight battery which was also seized on the same day.

Q. I ask you to observe what has been marked as Government's Exhibit No. 90 and 93-A for identification.—

The Court: Just a moment.

90 has also been received.

Mr. Palermo: Excuse me, your Honor, that should be 93 and 93-A, your Honor.

The Court: All right.

I think there is an unanswered question as to 93 and 93-A for identification.

By Mr. Palermo:

Q. Do you identify those? A. Yes, sir, these are two small brass containers which (811) were taken on the same day.

James P. Kehoe, for Government—Direct.

Q. And I ask you—

The Court: Can you give a better description?

The Witness: Yes, your Honor.

93 is a hollow piece of brass tubing, approximately one inch and a half long, and it unscrews at one end; and 93-A is a smaller brass object approximately one-half inch long, and a little larger in diameter than 93, and that also unscrews at one end.

The Court: Is that also a piece of tubing?

The Witness: It doesn't appear to be a piece of tubing.

The Court: It doesn't appear to be a piece of tubing.

Is it a cylinder?

The Witness: It is a cylindrical-shaped object.

By Mr. Palermo:

Q. I now show you Government's Exhibit No. 94 and 95 for identification and ask you to identify them. A. These, sir, are tie clasps which were seized on the same day.

Q. Would you also observe Government's Exhibit No. 96 for identification, and identify that? A. Sir, this is one cuff link which was seized on the (812) same day.

Mr. Palermo: At this time, your Honor, the Government offers in evidence Exhibits 93 through 96 for identification, 92, your Honor, 92 through 96.

The Court: Same objection, same ruling.

Mr. Fraiman: Same objection.

The Court: Same ruling.

By Mr. Palermo:

Q. Subsequent to your seizure of these objects, Mr. Kehoe, did you forward them to the F. B. I. Laboratory personnel? A. They were examined by F. B. I. Laboratory personnel, sir.

James P. Kehoe, for Government—Direct.

Mr. Palermo: The Government has no further questions, your Honor.

The Court: Well, now, am I correct in assuming that Exhibit No. 91 and 91-A has not been offered—have not been offered?

Mr. Palermo: It has been inadvertent, if it was, your Honor.

The Court: Are those two comprehended in your last offer?

Mr. Palermo: Yes, your Honor.

Mr. Fraiman: We have the same objection to those, (813) your Honor.

Mr. Palermo: If I may, I would like to ask some further questions of the witness.

By Mr. Palermo:

Q. Mr. Kehoe, would you demonstrate to the Court and jury how Government's Exhibit No. 91 and 91-A in evidence function? A. 91-A is the smaller of the screws which is threaded on the inside. It comes apart by taking the head and unscrewing it.

Upon being unscrewed, the inside of it is hollow, and there is a small brass cylinder inside the hollow screw.

Q. Does the other screw operate in the same manner?

A. Yes, sir, it does.

Q. I show you now what is Government's Exhibit No. 92 in evidence, and ask you to demonstrate that to the Court and jury. A. This is a small flashlight battery and upon removal, removing the paper, the bottom portion of the battery slides off and you have a hollow section in the lower third of the flashlight battery itself.

Q. Would you also demonstrate the operation of Government's Exhibit No. 93 in evidence? (814) A. This is the cylindrical brass object which upon being unscrewed at the top is hollow inside, and in the head of it, contains a slotted spindle.

James P. Kehoe, for Government—Cross.

Mr. Palermo: Thank you, very much, Mr. Kehoe. No further questions on direct, your Honor.

Mr. Fraiman: At this time, on the same basis of our other motion, we move to strike the testimony of the witness Kehoe insofar as it is related to the description of the items that he observed when he entered the Fulton Street address on August 17th, on the basis of the fact that the search warrant pursuant to which he entered the room was founded on this tainted evidence.

The Court: Motion to strike denied, reserving the right to renew.

Mr. Fraiman: May I ask a few questions, on cross examination at this time, your Honor?

The Court: Surely.

Cross examination by Mr. Fraiman:

Q. Mr. Kehoe, on June 21, 1957, you testified that you were at the Hotel Latham approximately seven-thirty in the morning? (815) A. Yes, sir.

Q. You say that you observed the defendant in Room 839? A. Yes, sir.

Q. Did you also observe at that time several agents of the Federal Bureau of Investigation standing inside the room and at the doorway of Room 839? A. I believe I only observed one agent of the Federal Bureau of Investigation leaving the room at approximately that time.

Q. Leaving the room? A. And there were other agents in the corridor.

Q. Who were these— Who was the agent you observed leaving the room? A. I believe it was Agent Gamber.

Q. You say that you also observed the defendant leaving the hotel some time in the morning?

James P. Kehoe, for Government—Cross.

The Court: He said that he observed him leaving the room.

Q. Leaving the room? A. Leaving the room, sir.

Q. At the time he left the room was he in custody? A. He left with other gentlemen.

Q. Did you observe that he was handcuffed when he (816) left the room? A. I did not so observe.

Q. Did you know that he was under arrest when he left the room? A. I had assumed that, sir.

Q. Who checked the defendant out of his room, Agent Kehoe, do you know? A. To the best of my knowledge, sir, it was Special Agent Thomas Green.

Q. Of the Federal Bureau of Investigation? A. Of the Federal Bureau of Investigation.

The Court: I am sorry, I don't know what you mean by who checked him out of his room.

By Mr. Fraiman:

Q. Who arranged with the hotel management to have the defendant's bill paid? A. I believe it was Special Agent Green.

Q. Of the Federal Bureau of Investigation? A. Of the Federal Bureau of Investigation.

Q. It was subsequent to the time that the Special Agent made those arrangements that you obtained the permission of the hotel management to search the room? A. That is correct, sir.

Q. At approximately what time did you conduct your (817) search of the room? A. I would say it began at approximately nine-fifteen A. M.

James P. Kehoe, for Government—Cross.

Q. And what time did you complete it? A. I would say approximately twelve-fifteen P. M.

Q. Agent Kehoe, did you also participate in an earlier search made at 252 Fulton Street? A. Yes, sir.

Q. That is, prior to August 17th? A. Yes, sir.

Q. What was the date of that search? A. The exact date, I can't recall, sir.

Mr. Fraiman: I wonder if the Government could furnish that date, the first search?

Mr. Palermo: We object to this line of cross examination in that it does not relate to anything which was brought out from the witness on direct examination.

The Court: Well, I don't think that that is a very substantial objection.

The question is, will you give him the date, if you know it?

Mr. Maroney: We can check it. I wouldn't be sure of the exact date. I think it was June 28th. (818) I think it was about June 28th.

The Court: June 28th, does that refresh your memory?

The Witness: That is the approximate date.

Mr. Maroney: It was a Saturday morning.

The Court: I can tell you if June 28th was a Saturday, I can go that far.

I think that June 29th was a Saturday, and June 28th was a Friday.

Mr. Maroney: 29th was a Saturday, your Honor?

The Court: Yes.

Mr. Maroney: That would be the date then.

The Court: Subject to correction, then, the earliest search was made in June 29, 1957.

(819) Q. As a basis for that search, Agent Kehoe, did you also have a search warrant? A. Yes, sir, I did.

James P. Kehoe, for Government—Redirect

Q. Were you accompanied by other agents of the Federal Bureau of Investigation when that search was made?

A. Yes, sir, I was.

Mr. Fraiman: Will you bear with me for just one moment, your Honor?

By Mr. Fraiman:

Q. Prior to conducting your search on June 21 at the Hotel Latham, Agent Kehoe, did you obtain the defendant's consent to search the room? A. No, sir.

Mr. Fraiman: Your Honor, I have no further questions of this witness.

May I ask that in addition to the search warrants and affidavits of the two searches at Fulton Street, the returns of those—made pursuant to those search warrants—be included also as part of the record of this case?

The Court: I think that they are part of the record of this case now. I am not sure, but I think that is so.

The Clerk: They are on file, your Honor.

(820) Mr. Fraiman: They weren't part of our motion, your Honor.

The Court: I am sorry, I just don't know what you have in mind.

They are in the record in this case, period.

Mr. Fraiman: So long as they are, your Honor, that is satisfactory.

Mr. Palermo: I just have one question, your Honor, on redirect.

Redirect examination by Mr. Palermo:

Q. What was the time that you observed the defendant in this case leaving his room, 839, Mr. Kehoe? A. I would say approximately eight-thirty A. M., sir.

James P. Kehoe, for Government—Redirect.

Q. And the time that you entered was— A. Nine-fifteen.

Q. Nine-fifteen. A. A. M., sir.

Mr. Palermo: That is all, your Honor.

(Witness excused.)

Mr. Maroney: Your Honor, in the interest of saving time, counsel for the defendant have agreed to stipulate that if special agents Joseph Phelan and—

(821) The Court: What is that name?

Mr. Maroney: Joseph Phelan, P-H-E-L-A-N, and Robert Beatson, B-E-A-T-S-O-N, were called to testify, they would testify that between the two of them, they constantly observed the door to Room 839 at the Hotel Latham—

The Court: On June 21?

Mr. Maroney: On the morning of June 21, 1957, —from the time the defendant left the room accompanied by Immigration officers, and that no one entered.

The Court: From a time to a time? From the time that the defendant left—

Mr. Maroney: Until Mr. Kehoe, who was just testifying—

The Court: Until Mr. Kehoe entered with the consent, is that it?

Mr. Maroney: That is right, sir.

The Court: And that—

Mr. Maroney: And that during that period of time no one entered or left Room 839.

The Court: Is it so stipulated?

Mr. Fraiman: So stipulated, your Honor.

David Levine, for Government—Direct.

(822) DAVID LEVINE, a witness called on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Featherstone:

Q. Mr. Levine, where do you reside? A. 285 Lincoln Place.

Q. And what is your occupation?

The Court: Brooklyn?

The Witness: That's right, sir.

I am an artist.

Q. Do you have a studio, Mr. Levine, where you pursue this occupation? A. At 252 Fulton Street.

Q. At some time in 1954, did you meet a man named Emil Goldfus? A. I did.

Q. Can you identify that man as being in this court room? A. He is sitting at that table there (indicating).

Mr. Featherstone: May the record show that Mr. Levine has identified the defendant as Emil Goldfus?

Mr. Fraiman: No objection.

(823) By Mr. Featherstone:

Q. Under what circumstances did you meet Mr. Goldfus, Mr. Levine? A. In another artist's studio, discussing our work.

Q. And where was this artist's studio? A. Also on the same floor with my studio; Burton Silverman's studio.

Q. And subsequently did you continue to see Mr. Goldfus from time to time? A. Whenever I would visit Silverman, he might be in his studio.

Q. Did there come a period of time, in 1955, some time in the summer, when you did not see Mr. Goldfus for a period of time? A. Around April or May. Some time during that.

David Levine, for Government—Direct.

Q. And how long a period of time elapsed between the times that you did not see Mr. Goldfus? A. To the closest that I can recall, about two or three months.

Q. When did you acquire your studio at 252 Fulton Street? A. In February.

Q. Of what year? A. February, '57.

(824) Q. After you acquired this studio, did you continue to see Mr. Goldfus? A. Almost daily.

Q. Almost daily.

At some time in 1957 did you enter into any arrangements whereby you rented a storage room at 252 Fulton Street? A. Yes. I am not sure of the time—the date.

Q. Could you approximate the date? A. Around April, perhaps a little earlier. Early part of April.

Q. Would you explain to the Court and jury the arrangements for the rental of this storage space? A. Goldfus would keep some equipment in a niche in the studio, and I would take the rest of the space for Christmas card—

The Court: For what?

The Witness: For Christmas card business.

Q. Who actually leased the storage room? A. Originally he did, and he informed the landlord, and it was switched over to my responsibility, but he left me money to pay for it.

Q. When did you become the lessor? A. By, I think, May.

(825) The Court: Do you mean lessor?

Mr. Featherstone: I mean the lessee. Pardon me.

The Witness: Possibly May.

By Mr. Featherstone:

Q. Do you recall the room number of this storage room? A. I think 509.

Q. Who else used this particular storage room besides you and Mr. Goldfus? A. I invited a man named Franz Felix to store things there, another artist in the building.

David Levine, for Government—Direct.

Q. On August 17, 1957, were you using this particular storage room in Room 509? A. Yes.

Q. Who else at this time was using the storage room? A. Franz Felix and Goldfus still had things there.

Q. Were you the only three people who used— A. As far as I know.

Q. —this storage room? A. As far as I know.

Q. How long had the defendant used the storage room? (826) A. As—I really never knew for how long.

I assumed as long as he had been there but I don't know for sure.

Q. Did the defendant, to your knowledge, have property in the storage room on October 17, 1957?

The Court: August 17.

Mr. Featherstone: August 17.

Pardon me.

The Witness: Yes.

By Mr. Featherstone:

Q. Mr. Levine, I am going to show you some objects taken from the storage room and ask you whether these objects belong to you or not?

I show you what has been marked Government's Exhibit No. 32, and ask you whether this is yours (counsel hands object to witness)? A. (Witness examines object.)

You want me to state that now?

Q. Yes. A. No. This—this isn't.

Q. I show you what has been marked as Government's Exhibit No. 89, and ask—

The Court: Is that 89?

Mr. Featherstone: That's right, sir.

(827) (Mr. Featherstone hands exhibit to witness.)

The Witness: (Witness examines exhibit.) No.

By Mr. Featherstone:

Q. Government's Exhibit No. 92 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

David Levine, for Government—Direct.

Q. Government's Exhibit No. 91 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

Q. Government's Exhibit No. 91-A (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

Q. That is not yours? A. No.

Q. Government's Exhibit No. 90 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) A. No, that is not mine.

Q. Government's Exhibit No. 93-A (counsel hands exhibit to witness.) (828) A. (Witness examines exhibit.) No, not mine either.

Q. Government's Exhibit No. 93 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

Q. Government's Exhibit No. 94 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

Q. Government's Exhibit No. 95 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

Q. Government's Exhibit No. 96 (counsel hands exhibit to witness.) A. (Witness examines exhibit.) No.

Q. Is it true, then, Mr. Levine, that none of these objects belong to you or have ever belonged to you? A. That is correct.

Q. Mr. Levine, would you give us, again, the full name of the third tenant of the storage room, Room 509? A. Franz Felix.

(829) Q. Franz Felix? A. That is the way I know it.

Q. Mr. Levine—

The Court: F-E-L-I-X?

Mr. Featherstone: That is right, sir.

By Mr. Featherstone:

Q. When was the last time that you saw Mr. Goldfus prior to this morning? A. I believe sometime in May.

Q. At that time—

The Court: May of 1957?

The Witness: That is right, sir.

David Levine, for Government—Cross.

By Mr. Featherstone:

Q. At that time, did the defendant tell you where he was going? A. He said either some place high like the White Mountains or Arizona, some place good for his sinus condition.

Q. Did he say when he planned to return? A. As soon as he felt better, nothing more specific.

Mr. Featherstone: No further questions.

(830) *Cross examination by Mr. Fraiman:*

Q. Mr. Levine, you say that you have known the defendant since some time in 1954? A. I believe so.

Q. Could you speak up so that I can hear you, please, sir. A. I believe so.

Q. Subsequent to 1954, did you meet with him frequently? A. Several times a month.

Q. I believe you testified that some time early in 1957, after February, 1957, you saw him almost daily? A. When I moved into my studio.

Q. Did Mr. Abel also know your family, sir? A. He had met my wife, yes.

(831) Q. You dined— A. And my mother.

Q. Excuse me? A. And my mother.

Q. Had he dined with you on occasion? A. Once.

Q. Sir, do you also know other people who know Mr. Abel? A. Several other artists.

You want me to give the names?

Q. I don't believe that it is necessary.

In the course of your acquaintanceship with the defendant, did you ever have occasion to discuss his reputation for honesty and integrity with any of these other people?

A. He was generally accepted as an honest man among us.

Q. His reputation for honesty was good? A. Yes.

Q. And for integrity? A. Yes.

Mr. Fraiman: No further questions.

The Court: You knew him as what?

Stipulation Concerning Testimony of Franz Felix.

The Witness: Emil Goldfus.

The Court: Was the use of his name ever (832) discussed by you and these other persons with whom you say you did discuss his reputation?

The Witness: No, sir. We just used his name.

Mr. Featherstone: No further questions.

(Witness excused.)

Mr. Maroney: Your Honor, in the further interest of saving time, counsel have agreed to stipulate that if Mr. Franz Felix were called as a witness at this time that he would testify that, to his knowledge, the three people who used the storage room, 509, at 252 Fulton Street in Brooklyn on August 17th of this year and prior thereto were Mr. Levine, who has just testified, Mr. Felix, and the defendant in this case; and that none of the property which was just shown to Mr. Levine belongs to Mr. Felix.

The Court: Namely, Exhibits 32, 89, 91, 91-A, 92, 90, 93, 93-A, 94, 95 and 96?

Mr. Maroney: That is correct, sir.

The Court: It is stipulated that if Franz Felix were to be called as a witness he would testify (833) as has been stated?

Mr. Fraiman: Yes, your Honor.

The Court: Now, you said that that was true as of August 17th.

Mr. Maroney: And prior thereto.

The Court: Yes, but prior thereto is an indefinite term.

Does that include June—was it 29?

Mr. Maroney: Well, it would include June 29th, your Honor.

Mr. Fraiman: So far as we are concerned, your Honor, it would include whatever period Mr. Felix occupied the studio, but I don't know what dates those were.

Frederick E. Webb, for Government—Direct.

The Court: The term "prior thereto" is an indefinite thing. We are interested specifically, I think in August 18th and also in June 29th.

Mr. Maroney: Not as to this room, your Honor.

The room involved on June 29th was 505, which was tenanted by the defendant exclusively according to exhibits now in evidence.

The Court: In other words, none of the exhibits that we have just been discussing derives any importance from the date, June 29th?

(834) Mr. Maroney: That is correct, sir.

We have presented no evidence on that room.

The Court: All right.

•FREDERICK E. WEBB, a witness called on behalf of the Government, was recalled, having been previously duly sworn, and testified further as follows:

Direct examination (continued) by Mr. Maroney:

Q. Mr. Webb, I show you Government's Exhibits 76 in evidence and 75 in evidence (counsel hands documents to witness) and ask if you have previously examined the signature cards which make up part of those exhibits. A. (Witness examines documents.)

Yes, sir. I examined the handwriting on both of these exhibits 75 and 76.

Q. And specifically did you examine the signatures appearing on those cards, the signature of one Martin Collins? A. Yes, sir. I compared the signature on Exhibit 75 with that on 76.

The signatures on both cards are Martin Collins, and I reached the conclusion that the handwriting on both of these cards, consisting of the signatures and the addresses (835) that appear beneath the signatures, were written by the same person.

Frederick E. Webb, for Government—Direct.

Mr. Maroney: So that the jury will understand what exhibits we are referring to, your Honor, might I just briefly explain that exhibit 76 is the registration card for Martin Collins at the Hotel Latham, showing his registry at the hotel beginning May 18, 1957; and Exhibit 75 is a registration card of the Daytona Plaza Hotel, Daytona Beach, Florida, showing a registration of Martin Collins in April—from April 28th to May 17, 1957.

By Mr. Maroney:

Q. Now, Mr. Webb, I show you Government's Exhibit 78 and ask you if you have previously examined that document (counsel hands document to witness.) A. (Witness examines document.)

Yes, sir, I have.

Q. Now, Exhibit 78 is a birth certificate—a New York State birth certificate—purporting to show the birth of a Martin Collins.

Now, have you previously examined Exhibit 78 for the purpose of determining the nature of the handwriting appearing thereon? A. Yes, sir. I made an examination of the handwriting (836) on this Exhibit 78.

The Court: Now, are you going to ask further questions on this?

Mr. Maroney: Yes, sir.

The Court: I suggest that you allow the jury to look at this piece of paper before you ask any further questions.

Mr. Maroney: (To bailiff) Would you pass it to the jury?

(Whereupon the bailiff handed the exhibit to juror No. 1.)

Juror No. 4: We saw that yesterday.

Frederick E. Webb, for Government—Direct.

By Mr. Maroney:

Q. Now, Mr. Webb, I also show you Government's Exhibit 85 in evidence, which contains true samples of the handwriting of Dorothy Adams, which samples were identified yesterday by Mr. Usher, and I will ask you if you have previously examined specifically the signature appearing in the exhibit on the first page of the samples of Dorothy Adams (counsel hands document to witness). A. (Witness examines document.)

Yes, sir, I have.

Q. And have you made a comparison between those true samples and the purported signature of Dorothy Adams which (837) appears on Government's Exhibit 78? (Counsel hands document to witness.) A. (Witness examines document.)

Yes, sir. I made a comparison between the Dorothy Adams signature on Exhibit 78 with the signatures on Exhibit 85.

Q. And as a result of that comparison do you have an opinion as to— A. I—

The Court: Just a minute.

Q. —as to the authenticity of the Dorothy Adams signature appearing on the Martin Collins birth certificate, Exhibit 78? A. Yes, sir, I do.

The Court: Just a moment.

Isn't the correct question: "Have you an opinion as to whether the same person wrote the signature of Dorothy Adams"?

Mr. Maroney: That is correct, sir.

The Court: "On one paper as on the samples."

Isn't that the correct question?

Mr. Maroney: I think that would be.

Frederick E. Webb, for Government—Direct.

By Mr. Maroney:

Q. Would you answer that question, then, Mr. Webb, (838) as put by the Court? A. Yes, sir. I do have an opinion.

Q. And have you caused enlargements to be made of the Martin Collins birth certificate, Exhibit 78? A. Yes, sir, I have.

Q. And have you caused enlargements to be made of the sample signatures of Dorothy Adams, Exhibit 82? A. Yes, sir. One of the signatures, I believe.

Q. And are those enlargements true and faithful reproductions of what they purport to represent? A. Yes, they are.

Mr. Maroney: May we mark these in evidence as the clerk is putting the tag on them?

The Court: If I knew what "these" means I could answer the question.

Mr. Maroney: These are enlargements which were previously referred to by Mr. Webb of portions of Government's Exhibit 85 in evidence and several enlargements of various portions of Exhibit 78 in evidence.

Mr. Fraiman: May I look at them?

The Court: Surely.

Mr. Fraiman: No objection.

(The enlargements of portion of Exhibit 85 was (839) marked Government's Exhibit 85-A and received in evidence.)

(Enlargement of portion of Exhibit 85 was marked Government's Exhibit 85-B and received in evidence.)

The Court: What is it an enlargement of?

Mr. Maroney: Enlargement of another portion of this first page.

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The Court: But it is all part of—

Mr. Maroney: 85.

The Court: I see. All right.

Mr. Maroney: The next series are enlargements of the whole and various parts of Exhibit 78 in evidence.

The Court: This will be 78-A.

Mr. Maroney: 78-A will be the first of the series. And 78-B is an enlargement of a part of 78.

(Enlargements of Exhibit 78 were marked Government's Exhibits Nos. 78-A, 78-B, 78-C, 78-D, 78-E and 78-F and received in evidence.)

By Mr. Maroney:

Q. Mr. Webb, would you step down and explain from these charts your examination? A. (Witness proceeds to rack.)

The enlargement to the left, marked Exhibit 78-A, is (840) an enlargement of the birth certificate, Exhibit 78.

It shows the entire New York birth certificate form with the handwriting on it consisting of the name, Martin Collins, male, July 2, 1897, 32024, July 15, 1897, eleventh, and abbreviation for April is Apr. 1947, and the signature here which is Dorothy Adams, and there is a number in the upper right-hand corner, 32852 DA.

In my examination of this handwriting on this birth certificate I found that the handwriting was not normal handwriting. The lines were not made smoothly with an even flow of ink as normal handwriting would be.

The exhibit on the right is an enlargement from Government's Exhibit 85 and the one on the top, on the right, is 85-B, which is handwriting that is normal handwriting and the flow of the ink is even all through the lines and the lines are not shaky or uneven as they are shown in Exhibit 78, as reflected here in the enlargement, 78-A.

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(849) Q. Now, specifically with respect to the signature, the purported signature on Exhibit No. 78, of Dorothy Adams, I believe you previously testified that you have compared that signature with the signature of Dorothy Adams appearing—or the signatures appearing on Government's Exhibit No. 85 which were identified yesterday by Mr. Usher of the New York City Health Department as being the true handwriting of Dorothy Adams.

Would you state your conclusion with respect to your analysis of those two signatures? A. Well, I reached a conclusion that Dorothy Adams did not prepare the signature on the birth certificate.

Q. Or at least the person that made the handwriting on Exhibit No. 85, did not write the signature Dorothy Adams on Exhibit No. 78; is that correct? A. That is correct.

Q. Now, Exhibit No. 85 also contains samples of the handwriting, according to Mr. Usher, of Dorothy Adams, of the words, Martin Collins, and male, specifically.

Have you compared the words "Martin Collins" and the word "male," and also the word "July," all of which appear on the exhibit, Exhibit No. 78, with the handwriting specimens of Dorothy Adams appearing on Exhibit No. 85? A. Yes, I have.

Q. Would you state your conclusions as a result of your—or your opinion, as a result of your examination of those words on the two documents? (851) A. I also reached the conclusion that the person who prepared Exhibit No. 85 did not prepare or write the Martin Collins, words, the words, July, the word male, on Exhibit No. 78.

Q. Do you have an opinion as to whether the person who wrote Martin Collins on Exhibit No. 78 was attempting to duplicate the handwriting appearing on Exhibit No. 85? A. I found that the handwriting on Exhibit No. 78, most of it was in the same form, that is, the same style of handwriting as that of Dorothy Adams whose known handwriting was furnished to me and is marked as Exhibit No. 85, so that, it was my opinion that someone was attempting to

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duplicate for the most part on Exhibit No. 78 her handwriting.

Mr. Maroney: Your Honor, I have no further questions on this specific line of inquiry.

The Court: I understand that to be your opinion, Mr. Witness, that the handwriting on Exhibit No. 78 of the words to which you refer—

The Witness: Yes, sir.

The Court: —reflect an effort to simulate—

The Witness: That is correct, sir.

The Court: —the writing of Dorothy Adams in (852) the respects indicated?

The Witness: That is right.

That is correct, sir.

The Court: Suppose you cross at this time on this matter.

Mr. Fraiman: I have no cross, your Honor, at this time.

I have no cross.

The Court: Are you going to cross examine Mr. Webb on this subject matter?

Mr. Fraiman: No, I am not, your Honor.

Direct examination (continued) by Mr. Maroney:

Q. Now, Mr. Webb, in the course of your training and duties at the F. B. I. Laboratory, over the past fifteen years, have you had training in the making of microdots, and the method by which microdots are made? A. We have experimented, yes, in the making of microdots; yes.

Q. Are you familiar with one or more processes by which microdots can be made? A. Yes, sir, I am.

(853) Q. Would you explain—

The Court: Do you mind if I interrupt you a minute, just to satisfy my curiosity?

Is there to be any testimony elicited from this witness concerning Exhibit No. 75 and 76 with

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respect to the matters developed concerning Exhibit 78?

Mr. Maroney: No, sir.

The Court: Thank you.

By Mr. Maroney:

Q. Would you explain to the jury what a microdot is?

A. A microdot is the term ordinarily used for a photograph reduction made of a document.

The document could be one, the size of the tablet sheet here, eight by ten inches, or something of that kind, reduced down to a size about the size of a period on a typewriter, or it might even be a little smaller or a little larger; but that would be the order of what is commonly referred to as a microdot.

The original sheet may have a typewritten message, it could even have a handwritten message or drawing and when reduced to that size would be capable of being enlarged in a manner so that it would be readable.

(854) Q. Now, would you explain how the sheet containing writing or a diagram or whatever it might be, what process would be followed to reduce that to a small size such as you have indicated? A. Well, one very ordinary process, usual process would be to perhaps make a two-step reduction. First, produce a 35 millimeter, or negative with a 35 millimeter camera and then take that reduced negative and in a second step, with a very short focal length lens and using light transmitted through this 35 millimeter negative, produce along a suitable photographic material an exposure at this reduced microdot size.

Q. Now, in that process of reduction, is there a special type of film that is necessary? A. You would have to use a type of film which would record the image accurately at that reduction, and some kinds of photographic materials are not suitable because the grain of emulsion is too coarse and they will not resolve the lines at that great reduction.

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Q. I show you what has been marked—I show you Government's Exhibit No. 27 in evidence which is a box of film, spectroscopic film, and I will ask you if you are familiar with spectroscopic film of that type? A. Yes, sir.

(855) Q. Are you familiar with the qualities of that film? A. Yes, sir.

Q. Would you explain what those qualities are? A. Well, the principal quality with reference to microdot work is that this film is capable of producing an image that would be—that you would make under the reduction that you would attempt to get in a microdot.

In other words, this film is capable of recording about one thousand lines per millimeter, which means that it has extreme resolving power, and therefore the blacks in the image that you would get under microdot reductions would be recorded separate from the white portions; so that there would be a separation from one part of the letter to the other, in the typewritten message, say, or from one letter to the next; which would make it possible to examine the microdot through a microscope and read it or to photographically enlarge it and get a picture of it that would be readable.

Q. Is that what—or is that a high emulsion film? A. A film with high resolving power, this film has an emulsion especially prepared so that it has a high resolving power which ordinarily is necessary in a lot of scientific work, but also makes it also a good one to (856) use if you are preparing to make a copy under extreme reductions that you would have in making a microdot.

The Court: The expression high resolving power means something to you, perhaps it does to the jury; but I am handicapped.

What do you mean by high resolving power?

The Witness: High resolving power is the quality of film—well, best to explain it this way:

If you were to put in a millimeter a thousand separate and distinct black lines each having a white

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space between them, that line and the next, this film is capable of recording those lines just as they are, with the separation of the black and the white, between them.

The Court: And is it by reason of that quality that this film is adaptable for use in the production of microdots?

The Witness: Yes, sir, it is.

Q. What would happen, Mr. Webb, if you used a film of lower resolving power? A. Well, if you were to use, to attempt to do this with just ordinary photographic materials, photographic materials that are available, when you tried to make a microdot at this reduction you would end up with simply a black (857) dot and nothing—when you looked through a microscope you would not be able to see the letters or parts of the letters separated one from the other.

There would be no separation of the whites. You would not be able to record it as a microdot.

Q. I show you what have been marked in evidence as Exhibits 91, 91-A, 94 and 95, and ask you if you previously examined those exhibits? A. Yes, sir, I have previously examined these exhibits.

Q. When you first examined them, where did you see them? A. These particular exhibits I first saw in New York City, and I took them to Washington with me for an examination.

(858) Q. Now, have you caused photographic enlargements to be made of those four exhibits? A. Yes, sir, I have.

Q. With respect to Exhibit No. 94, being two tie clasps, would you state the results of your examination of those two tie clasps? A. I found that these two tie clasps open up and have cavities inside.

The one which has a cylindrical-shaped ornament on the front, the end of that tie clasp, that is, the end of the cylindrical ornament comes out and reveals inside a space or a cavity.

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The other one, the other tie clasp which is a part of Exhibit No. 94, has a bar, a silver bar-shaped ornament, and the front of the bar comes off and inside there is a cavity, a rectangular shaped cavity.

Q. Now, would you also state the result of your examination of Government's Exhibit No. 95?

The Court; Excuse me. As of the result of your experience in dealing with these matters, are you able to state whether or not the cavities to which you have referred are large enough to contain microdot messages?

The Witness: Well, these cavities in Exhibit No. (859) 94 are large enough to contain microdot messages; they are also large enough to contain microfilm messages up to certain sizes or certain kind of microfilm messages in which the film backing has been removed, so that the microfilm could be folded or rolled up to a smaller space.

Q. Now, Mr. Webb, I show you Government's Exhibit No. 88, for identification, and ask you if you have—I am sorry.

Mr. Maroney: I am sorry, I think that I previously asked Mr. Webb to give his results of his examination of Exhibit No. 95, and I would like him to proceed with that before going on with this.

The Witness: Exhibit 95 is a tie clasp which has an inlaid wooden ornament and the wood ornament comes apart which reveals inside a cavity, inside the wood itself, an oblong-shaped cavity, and it is, of course, big enough to hold microfilm or microdot or even could hold messages on thin paper.

Q. Referring then next to Exhibit No. 88 for identification, I ask you if you can identify that? A. Yes, sir.

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Q. Would you state whether or not that was received in the F. B. I. Laboratory in the normal course of (860) business? A. Yes, it was.

Q. And was it examined under your supervision? A. Yes, it was.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit No. 88 for identification.

Mr. Fraiman: As I understand it, if your Honor please, Government's Exhibit No. 88 for identification was removed from the wastepaper basket at the Hotel Latham on June 21st.

The defendant objects to the admission into evidence of this particular exhibit on the ground that it was seized at an illegal search in violation of the Fourth Amendment of the Constitution.

The Court: Have you in mind the contents of the wastepaper basket being such as the result of the voluntary action of the person who was then being questioned?

In other words, have you in mind the element of his giving the property up by putting it in the wastepaper basket?

Mr. Fraiman: I am aware of the testimony, however, we are not willing to concede that he had (861) voluntarily relinquished his—

The Court: Why do you think he put it in the basket?

Or don't you care to answer?

Objection overruled.

By Mr. Maroney:

Q. Mr. Webb, I think you stated that you examined that in the F. B. I. Laboratory, or you had examined it previously; would you tell the Court and jury the results of your examination of Exhibit No. 88? A. Yes, sir.

This was found to be a block of wood with sandpaper wrapped around it.

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The block of wood comes apart and inside the block of wood, rolled in thin paper, sealed with adhesive, cellulose tape, is a small booklet which was found to consist of about two hundred fifty pages and on each page a series of numbers appears.

In one section the numbers were in red printing, and the numbers were in five digit groups.

The other section were numbers or black numbers printed, but the numbers are also in five digit groups.

Q. Mr. Webb, do you know what that little book is? (862)

A. I would recognize this as a cipher pad which would be described as a onetime cipher pad.

The Court: What is that word?

Mr. Maroney: Cipher pad.

Q. Can you take one of those pages out?

(The witness proceeded to take one page out of the little book.)

Mr. Maroney: Your Honor, I wonder if I could pass this one page among the jury so that they can observe the numbers, rather than passing the book?

The Court: What will happen if they drop it?

Hadn't you better put it on a piece of paper?

Mr. Maroney: Perhaps if we just slip it inside one of these cellophane envelopes for the moment.

(The exhibit was exhibited to the jury.)

Mr. Maroney: Would you care to look at it, your Honor?

The Court: Well, the book is simply that which has been removed from Exhibit No. 88, isn't it?

Mr. Maroney: Yes, sir.

The Court: If you can, I think you might return that to the book and the book to its shelf, if that is what it is.

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(863) Did that page have to be torn out of the book or was it loosely between covers, or what?

How did you get it out?

The Witness: Sir, it was already—had worked loose.

All the pages in the book are bound together with just a little glue on the back, and that particular one just came loose.

The Court: Now, you are returning it?

The Witness: I put it back in the book, yes, sir.

The Court: What are you going to do with the book? Are you going to put it back in the box?

Mr. Maroney: Yes, sir.

(864) The Court: I am just asking for information, are the contents of the page, just referred to, to be related to any other testimony in this case?

Mr. Maroney: No, sir.

By Mr. Maroney:

Q. Now, Mr. Webb, showing you Government's Exhibit 87 for identification, I ask you if you can identify that.

A. Yes, sir.

I also examined this in the F. B. I. laboratory.

Q. Was that received by you in the normal course of business at the F. B. I. laboratory? A. Yes, sir, it was.

Q. Did you examine it at the laboratory? A. Yes, I did.

Q. All right.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit 87 for identification.

The Court: Same objection?

Mr. Fraiman: Yes, sir.

The Court: Same ruling.

That also came from the scrap basket?

Mr. Maroney: Yes, sir.

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Q. Would you state, Mr. Webb, the results of your (865) examination of that pencil? A. Yes, sir.

This pencil—

The Court: In the first place, it appears to be an ordinary wooden pencil?

The Witness: That is correct.

The stub end or at the eraser end of the pencil, approximately three inches long, Exhibit 87, the point having been sharpened with a knife rather than a pencil sharpener, the eraser end was found to come out of the pencil and the pencil was found to have been hollowed out drilled out so as to make inside the stub pencil itself a cavity.

The eraser end had on it a little wooden plug which fitted into that hollowed out cavity and made it appear as an ordinary stub end of the pencil.

The Court: Well, by stub, you mean a short pencil?

The Witness: Yes, short pencil.

Q. Now, when that was opened, can you state whether it contained anything? A. Yes, sir. This pencil contained several microfilms, eighteen of them, I believe.

Q. I show you a box marked Government's Exhibit 97 (866) for identification and ask you if you can identify the contents of the exhibit so marked. A. Yes, sir, these are the eighteen microfilms that were removed from the short pencil, Exhibit 87.

Q. After they were removed from the pencil were photographic prints made of the microfilm? A. Yes, sir.

They were photographed and also enlargements were made from each of the microfilms.

Q. I show you what has been marked Government's Exhibit 98 and 98-A and ask if you can identify those. A. Yes, sir.

Exhibit 98 is an enlargement from one of the microfilms which have been marked Exhibit 97 for identification;

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Exhibit 98-A which consists of two enlargements or enlargements made from two of the other microfilms which are part of Exhibit 97 for identification:

Q. Now, Mr. Webb, I show you Government's Exhibit 99 for identification and ask if you can identify that. A. Exhibit 99 for identification is enlargements of the remaining microfilm in Exhibit 97 for identification.

Mr. Maroney: At this time, if your Honor please, we offer in evidence Government's Exhibit 97 for identification, 98 for identification, 98-A (867) for identification.

Mr. Fraiman: Same objection, your Honor.

The Court: Same ruling.

Mr. Fraiman: As to Exhibits 87 and 88—

The Court: Same ruling.

(868) Mr. Maroney: Your Honor, Exhibit No. 98 which has been received in evidence this morning is in the Russian language, and I understand that counsel will stipulate that this exhibit I have here is an actual English translation of 98, and with that understanding could we attach it to 98 and make it a part thereof?

The Court: Yes, but you have a 98 and 98-A. Now, what is this?

98-B!

I have forgotten what 98-A is.

The Clerk: He is making this part of Exhibit No. 98 itself, your Honor.

The Court: A consisted of two enlargements of two other microfilms.

Now, you had better make this 98-B, hadn't you?

The Clerk: He wanted to attach it to 98 itself, which would be the Russian and English translation.

The Court: Is there any objection?

(869) M. Fraiman: No. We will so stipulate, that it is an accurate translation.

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The Court: All right. English translation attached.

Mr. Maroney: Now, Exhibit No. 98 which has just been referred to is in the Russian language and the translation is attached and it contains a heading, "January-December, 1957," and under that, "Data of the Center," and then there is a schedule.

The Court: Data of the—?

Mr. Maroney: Of the Center.

The Court: C-E-N-T-E-R?

Mr. Maroney: Yes, sir.

And then, under that, a schedule for each of the 12 months, January through December with two major headings, "Basic Sessions and Alternate Reserve Sessions."

And then there are seven columns, "Days of Work," "Time of Beginning of Transmission GMT," "Frequency Kilocycles," "Signal (Call signs)," and then under the "Alternate Reserve Sessions," similar columns.

There are eight columns actually, four under each of the two general classifications, "Basic (870) Sessions," and "Alternate Sessions," and then, for each month, the days of work are indicated for that particular month.

For example, in January, Wednesday and Saturday: the time of the beginning of transmission, GMT—Greenwich Meridian Time—for that month, and the days indicated, Wednesday and Saturday, are listed as sixteen hundred to seventeen hundred.

The Frequency Kilocycles 19,420 to 16,860, and the call signs P. O. K.

And then there is an alternate schedule giving to different days different times for the transmission, different frequency kilocycles, and different call signs.

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And we particularly note the May, June, July and August schedules on this exhibit; each one, of course, having different working days, each one having different times, frequency kilocycles, and different call signs.

May I pass this among the jury, your Honor?

(Counsel hands document to Juror No. 1.)

Mr. Maroney: Then Exhibit No. 98-A, which was identified by Mr. Webb this morning as being a photographic print of two of the frames of micro-(871) film which were found within the pencil, is a letter written in English addressed, "Dear Dad," and I will read just the first paragraph and some at the conclusion.

"Dear Dad:

"It's almost three months since you went away. Although it's not so much as compared with eternity, still it is a long time and the more so as there is a great quantity of news to tell you."

And then the letter is signed, "Yours, Evelyn," and dated February 20, 1956.

Mr. Fraiman: I am wondering, your Honor, if we could request the Government to read the remainder of the letter to the jury?

The Court: Why don't you do it to save time, because the other side can, if you don't.

Mr. Maroney: I will read the entire letter from the beginning.

"Dear Dad:

"It's almost three months since you went away. Although it's not so much as compared with eternity, still it is a long time and the more so as there is a great quantity of news to (872) tell you.

"First of all, I am going to marry. Please don't be astounded. I am much surprised myself, and still it is a fact to be taken for granted.

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"My future husband seems to be a good guy. He is 34 and a radio engineer. Mother likes him very much. We met at the birthday of our friend who lives in our bungalow. On February 25 we shall celebrate our wedding. I hope you will like him when you come back, I think you will have much to talk about.

"News number two: We are to get a new flat of two rooms. It is not what we supposed to get but it is a flat for ourselves and it is much better than what we have now.

"News number three:

"I found a job, engineer referrant in aviation, so now I shall be somewhat closer to you.

(873) The job seems to be a decent one. They promised to pay well, and my future boss seems to be an intellectual and polite guy. I did some odd jobs there and received a pretty sum of money.

"My future husband and I are both deeply interested in photography, especially in color photography. He has an Olympia car and we both enjoy meddling with it.

"We received both your letters and the key from the suitcase but the latter is still wandering somewhere.

"Our aunt, the one we took home with us, still lives here.

"Our childhood friend writes regularly and sends you his and his family's best regards and wishes.

"All our friends wish you health and happiness and a happy and quick way home.

"Well, this is all I have to say.

"Yours, Evelyn.

"February 20, 1956."

Direct examination (continued) by Mr. Maroney:

Q. Now, Mr. Webb, I believe you stated this morning that you had caused to be made photographic enlarge- (874)

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ments of Exhibits 91, 91-A, 94 and 95. Is that correct? A. Yes, sir, it is.

Q. And were those photographic enlargements true and faithful reproductions of what they purport to represent?

A. Yes, they are.

Mr. Maroney: At this time, your Honor, we have marked—the clerk has marked with the consent of defense counsel the exhibits which are the enlargements of these exhibits just referred to. He marked as Exhibit 91-B the exhibit which is 91, and the photographic enlargement of Exhibit 91-A has been marked Exhibit 91-C.

The photographic enlargement of Exhibit 95 is 99[95]-A, and the photo of Exhibit 94 has been marked 94-A.

May these be received, your Honor?

Mr. Fraiman: Your Honor, with respect to these exhibits, our objection is the same as our objection was to the original exhibits. We do not object to them as being accurate photographic copies.

The Court: Same ruling.

Overruled.

(Exhibits marked Government's Exhibit 91-B, (875) 91-C, 95-A, and 94-A were marked and received in evidence.)

By Mr. Maroney:

Q. Mr. Webb, would you step down and explain to the jurors the photographic enlargements? A. (Witness proceeds to rack.)

These photographic enlargements simply illustrate how these different items of evidence work.

Exhibit 91-B shows on the top part of the enlargement the Exhibit 91-A as it was originally discovered.

And the top of this exhibit was found to come out, being

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threaded to fit the shank part of this screw which had been hollowed out.

This shank portion here had been hollowed out, the top part of it threaded to fit the threaded cap which comes out, leaving inside the cavity within the shank of the screw itself, in this manner here (indicating).

This cavity—the extent of it can be seen by sticking a wire or something down into the shank of the screw (indicating), and it is something over an inch deep.

Then, the enlargement just under that which has been marked 91-C is the other screw, enlargement of Exhibit 91, and the enlargement on top shows the screw as it was originally discovered, and the enlargement underneath shows the (876) manner in which the screw works very similar to the one before.

The top threaded to fit into the shank part of the screw, and the shank of the screw has been threaded or has been hollowed out for a short distance, about the same as the previous one, a little bit over an inch.

Then, the enlargement marked 95-A shows the tie clasp which has an inlaid wood ornament; shows it intact at the top and then the lower part of the enlargement shows the wood ornament portion removed, and within that ornament, on the back side of the ornament, the hollowed out part or the cavity within. It is an oblong shaped cavity there (indicating).

Exhibit 94-A is an enlargement of the two tie clasps showing the two tie clasps, the one on the left is the one with the cylindrical ornament and at the top, both ends are on the ornament, and on the right-hand side at the top the same tie clasp with the little cap removed, and within that cylindrical ornament after the cap is removed can be seen that it is hollow also for the entire depth of the cylinder.

The other tie clasp, which is a part of Exhibit 94, made up of a bar, is shown in the lower part of the Exhibit, enlargement 94-A, and on the left the tie clasp (877) is intact.

Defendant's Exhibit F.

On the right-hand side of the lower part of the chart, the front part of the bar has been removed, revealing the rectangular shaped enclosure within the bar—the hollowed out part within the bar.

This is the thing—the item—as shown in the enlargement on the right-hand side (indicating), the space within that bar.

Mr. Maroney: We have no further questions of Mr. Webb, your Honor.

May I pass these exhibits among the jury?

The Court: Yes.

(Counsel hands exhibits to juror No. 1.)

The Court: Are we ready now for cross?

Mr. Fraiman: Your Honor, at this time the defendant would like to offer in evidence as a defense exhibit, Government's Exhibit 99 for identification.

Defendant's Exhibit F, I suppose. That is Defendant's Exhibit F, for identification.

The Court: That is Government's Exhibit for identification 99 which contains enlargements of the rest of the microfilms referred to in Exhibit 97?

Mr. Fraiman: That is correct, your Honor. Some of those microfilms are in Russian—letters (E78) which are in Russian—and the Government has furnished us with translations of those Russian letters and we should like to have the English translations of those letters affixed to Defendant's Exhibit F, for identification, as part of that exhibit.

Mr. Maroney: We have no objection to the substitution or the inclusion of the English translations, your Honor, but we do object as to the admissibility of those letters since they are personal letters which have nothing whatever to do with the issues charged here in the indictment.

The Court: Yes, but they constitute a part of Exhibit 97.

Defendant's Exhibit F.

Now, doesn't that entitle the defense to offer them for what they are worth?

You don't need to answer my question.

Mr. Maroney: I think they are entitled to offer it, yes. Our position was merely—

The Court: Do you press the objection?

Mr. Maroney: No, sir. I will not press the objection.

The Court: I understood your statement to be that seemingly these communications purport to be of a personal nature, is that it?

(879) Mr. Maroney: That is correct, sir.

The Court: Your concession doesn't mean that you agree that that is all they are, or does it?

Mr. Maroney: Oh, no. I mean I think that is what they purport to be.

The Court: Yes.

(Document heretofore marked Government's Exhibit 99 for identification was marked Defendant's Exhibit F and received in evidence.)

Mr. Fraiman: May I, your Honor, with the assistance of Mr. Debevoise, read these letters to the jury at this time?

The Court: Surely, if you think they would be interested.

Mr. Fraiman: I think perhaps they would be, your Honor.

These are a series of letters, ladies and gentlemen of the jury, which were on microfilm found inside the hollowed-out pencil that Mr. Webb has testified came from the waste basket in the Hotel Latham.

Some of them are in Russian translated into English and some of them are in the English language. The first four that I shall read are in Russian, which have been translated by the Government.

(880) "6th April.

Defendant's Exhibit F.

"My Dear:

"I am writing a second letter. Up till now I only heard (from you) from the trip. I want very much to find out how are you? How is your health?

"I am gradually beginning to come to myself. I am able to do some things around the house and am thinking about the summer home.

"I could go for a rest but I am afraid to move alone, so that I have not yet decided, although I passed the medical board. How necessary you would be to me now. And how good it is that you do not yet feel the need of being with me?

"Everything is the same with us. The children meanwhile live in friendship, and move around one after the other, when they are together.

"Evelyn does not work steady yet, it takes a long time to process, but is doing translations at home and has a pupil.

(881) "Free time from her husband and work, she takes me to the doctor and at the same time she herself had a checkup. Spring here will again be late. Up till now, it has been cold, damp and snow. The winter was simply horrible, and I am worried about my flowers.

"Eyunya (diminutive for Evelyn?) says the plum trees froze, and it's hard to get to the pears.

"Our acquaintance spent the winter at the summer home alone. It was very hard for her, and of course cold with such frosts, but she is feeling cheerful. She is sending you regards and wishes for an early return. Your father-in-law arrived long ago, he is well-established, and they are very pleased. He is now awaiting your earliest return, and I, although I know it is silly, I am counting off the days of the known period. Your gift—the dog Carrie or Kari (ph)—formerly Button feels very well and is fully accustomed to us. I have not

Defendant's Exhibit F.

received your package yet and for that reason am not going to thank you, since I do not know what will be there. A childhood friend visited (882) us; he was here on business for a week, and every day when he was free he visited us. We talked a lot, reminisced, and most of all day dreamed. Don't let us down! It is not clear yet about the apartment. We are waiting . . . And in general, our whole life, constant waiting . . . That's the way it is my dear. My servant is leaving. I am seeking a new one; and I'm not especially sorry. Write often as possible. The children, there are two now, send greetings and all the best for you. 'Son' is very disturbed; what kind of an impression he will make on you; he might not appeal to you at once. I am ending now. I kiss you firmly. I wish you luck, health, and most of all a speedy return."

Signed, "Elya."

Attached to that is another letter. This one is in English.

(883) Mr. Fraiman: "Dear Papa, I am very lonesome and await a letter from you. I married. My husband is an engineer in communications, the same as you he likes to fool around with the radio. He likes photography.

"Now we are getting ready to make an electronic exposure meter for the automatic determination of exposure while printing. Write what you think of this. We want also to make a densitometer for color printing, but as yet we have not determined if two will be needed to determine the sharpness of color and for the determination of general sharpness—or whether one will do. Write!

"My husband sends a big greeting and the best wishes. He wants very much to meet you as soon as he can. I also very much want that you will come soon.

Defendant's Exhibit F.

"I am getting set for a job in technical translation and review. Up till now I have not been approved and am sitting at home.

"I await your letter and your arrival.

"Our maid sends her greetings.

"I kiss you firmly your (884) Evelyn."

The next letter, also a translation from Russian, it is dated 21 June.

The Court: Any year?

Mr. Fraiman: No, your Honor.

"My dear. At last we received your small package. Everything pleased us very very much and as usual whatever you do, successfully with care and attention. Thank you, my good one. We were also very glad to have received a letter from you and to learn that everything is fine with you. It is a pity that you have not had letters from us in such a long time. I sent you several. I think that you will receive them all. We congratulate you on your birthday. Remember, on this day we will drink a toast for your well-being and your early promised return. We are at the summer place. In this raw, in many respects, year, our garden has suffered. On the best apple trees, from which last year you called a plentiful harvest, only now have the leaves started to appear. The pears, plums, also barely coming to life and they certainly are not yet bloom- (885) ing. In this year I do very little in the garden and house, I feel very bad, I have no strength. I am still fighting with the house servant and do not have a new one. How sad that the hyacinths traveled so long and dried out very much. Nevertheless, I planted them and am waiting for next to find out if they died or not. Also, the daughter of our childhood friend is visiting with us. She entered the academy and passed to the second course with good marks. With her I will send a knife. Everyone very much wants to see you soon and to even kiss you a lot.

Defendant's Exhibit F.

Herman—the husband of Ev, sits beside me and is drying my ink blotches. The television works. Our whole family sits around and watches, but I seldom look at it, I become very tired and my head starts to hurt. We put off for a while the plan for bigger gates, because the street is all upturned and it is difficult to approach in a car. I am now without a house servant, she left for a vacation. Still the same one. Although she does not satisfy me—she is very rude, but you can't find another. Our (886) female winterer herself remodeled the room—some room—and it looks very good. She lives there during the summer time with her—our cat and two children of Syunul (ph). The dog—Carrie, who was given to you by the husband of my sister is with us. She is a wonderful creature with thoughtful eyes. She behaves very well and resembles our Spotty in character. She too awaits her master, and I also wait. It is desirable to have a husband at home, at the present time I feel your absence much more, especially since I have been with you, remember what you had promised me before your departure. I am finishing writing. I kiss you firmly and all of our relatives and friends also do so. I wish you success and health. Our new chef is wonderful, attentive and tactful so that you can be calm. I kiss you. Elya.”

The next letter is undated and it is also a translation from Russian:

“My dear.

“See again has begun our endless correspondence. I do not like it so much, it would (887) be better to sit down and to talk. From the letter of Ev you know about our luck during your short absence. We arrived safely with the exception that the train bounced up and down and from side to side so that our bodies for a long time couldn't come to their

Defendant's Exhibit F.

balance. Now, I am no longer a traveler on this type of transportation. You already for sure imagine my absentmindedness and grief when I discovered the forgotten lunch, and certainly this was my fault. It was necessary at once to place it in my pocket. After your departure, I certainly was ill. There was a hardening of the arteries of the heart or hypertension crisis. I was in bed relatively a month and a half. Now I go and do a little but my nerves are not fully recovered. I sleep poorly and do not go out on the street. I walk on the balcony. It seems in this year that I will not be able to do anything with the summer home, although my children Evunya and Herman say that they will help, but you know that they will be working and of course tired. And yourself know what this is. My pupil will play (888) two new pieces. Sometimes I approach your instrument and look at it and want to again hear you play and I become sad. For the remaining money I asked basically to have them send it all to you, just as we talked. Daughter and I have everything except you. And she after getting married always says there are no such men as her papa and therefore she is not too much in love with her husband. You are the best of all for us. And don't frown, everyone says this who knows you. See the enlightenment in life came out funny, isn't it true? Yes, with us it was also funny. I didn't move to the apartment quickly, and an error occurred. They showed one apartment, but gave another. One was more or less evenly priced with ours then the last one lacked a lot. It is good that our chef was with me and I was ashamed to cry and hardly to suffer. So that the things remained packed. If you look at everything with a philosophical viewpoint, then, taking hair from your head doesn't pay, or in the future you have better luck, and in general in the apartment there will be a (889)

Defendant's Exhibit F.

general clean-up. This is the worst and it is not so bad. To ask for and to talk about a new apartment, I am not going to do. Nevertheless, according to the new rules they can give you an equally priced one. This does not suit me and to go to a lesser one it is ~~unnecessary~~. Especially effort for us to make an exception is not pleasant, and bothers our friends. Even so made an exception for us with the first apartment and gave us an apartment one and a half meters greater than ours. That is the funny stuff that occurred with us. Much ado about nothing. I am getting ready to go with my pupil to the North Sea and to rest and cure my heart, but I don't know how this will be. I am afraid to go alone and the little daughter is working. She got the job through her niece and her husband. She is very pleased with her work which pays well. Already she grieves that you are not here. Maybe tomorrow I will receive a letter from you. When I think about this my heart dies. I kiss you firmly and congratulate you. Try to arrange everything so that you do not delay (889-A) the period of our meeting. Years and age will not wait for us.

(890) "Your Elya kisses you. Son and daughter and all your friends congratulate you and send you the best of everything.

"Now the move to the new apartment will bring trouble and care. I asked for three rooms but didn't get them. My friend drove me over to look. The rooms by our estimation were smaller than ours but according to official data they must be larger by one meter. As soon as we receive permission to move we will once more go there to look and to measure everything. It would be necessary to discuss this matter with you. After, in the first place, where you were promised and it will not be suitable to go to the summer home. Such is the news with us. How are you there? How is your stomach? I think much

Defendant's Exhibit F.

about everything, that even Evunya's happiness does not make me happy. Take care of yourself. I want to live together with you for ourselves. The servant just as you figured is not old and although she left us she returned. It is very difficult for me without anyone now. Everything is very good at the summer place. Our old dweller is simply a hero and I am so grateful (891) to her for everything. Well, I finished my dear. See what kind of letter I wrote, and most important, what I wanted to. I kiss you and ask you to take care of yourself.

"Elya."

The next letter also is a translation from Russian, dated 20 August, no year.

"My Dear:

"How glad I was to learn that you finally received one of my letters. Which one in particular I am not sure, but it is good that you received it and I hope that you will receive the rest.

"In the congratulations I wrote little, certainly because it was inconvenient and not because I would not write in general, you are making this up. Once more I thank you for the package. We received it in May. Everything is all right and we liked everything very much. It is a shame that the hyacinths traveled long and two of them perished altogether. The rest are planted and already have rooted, further, leaves are in pairs, firm, and I go to them to talk with you, you know this is a live greet-(892) ing from you. Next year they will bloom.

"Our garden suffered a great deal this year. But the trees nevertheless remained whole. The pear, which you pruned, did not suffer at all, because the branches were close to the ground. The apples which I bought with you also survived all right. I just now

Defendant's Exhibit F.

arrived from a northern resort where I was once before. I went with my people. Evunya couldn't because she is working, and I was afraid to go alone. Now I feel all right, so that don't worry about me.

"Take care of yourself and come soon, we count every month that passes and you remember this. Now we have guests from the city from where you left. All remember you, especially the niece with the wife of your brother, they grieve that there is no one to play with and to set out solitaire with."

The Court: Is there any indication in these letters as to the addressee or the writer?

Mr. Fraiman: Other than the name by which the letters are signed, your Honor, and the salutation, that is all.

The Court: Well, there is nothing in the salutation (893) that indicates the person to whom it is intended, is there?

Mr. Fraiman: The ones that I would like Mr. Debevoise to read are addressed, Dear Dad or Dear Pappa.

The Court: But I mean that doesn't identify any individual, does it?

Mr. Fraiman: Not by name, no, your Honor.

Mr. Debevoise: The first is in English and is addressed:

"Dear Dad:

"I was very glad to receive your letter and know that you have at least received our letter, though only the first one. I hope that by the time you receive this one all letters will have reached you already.

"We got our parcel in May, and thank you very much for it. We liked your presents very much. We planted the hyacinths that have survived and by now three of them have sprouted. You say that you want to have more particulars about my husband.

Defendant's Exhibit F.

"I shall try now to give you a better picture of him. He is short, green-eyed, dark-haired, and rather handsome. He is rather gay and (894) talkative when the conversation considers cars or football. He works as an engineer in communications, mostly telephone. He seems to be a good specialist though he has no higher education. He is capable though rather lazy. My first task is to make him study. I am afraid that it would be a difficult one. Well, I must say that he is a nice chap, that he loves me, and loves mother, though he is not very warm toward his own parents. He has an old Opel Olympia and spends most of his spare time repairing it. He likes photography.

"You asked whether I am happy with him. As one of our greatest poets once said, there is no happiness in life, but there is peace and free will. As regards my freedom and will, they are not hampered in any respect. But as regards peace, I seem to possess an immense ability to find or invent troubles.

"My husband is liable to all sorts of fantastic ideas, such as to build a bar of brick in the pond that is in our forest. Thank the Lord, he has forgotten about it. I am very glad that he likes Mother and the whole of our (895) family. The only thing that troubles me is that I find him boring sometimes.

"Now about my in-laws. They are awful. The mother is anxious to persuade me that she loves me dearly, but somehow I don't believe her. The father likes to make the great man of himself and to poke his nose in other people's business. I have had a couple of warm conversations with him. He started making plans about our bungalow and garden and I told him that it was not his own, and nothing of his business, and that we could very well do without his advice, opinion or permission.

Defendant's Exhibit F.

"I do wish you were with us. Everything would be much easier for me then. I am missing you very much. I thought at first that my husband could substitute you more or less in some respects, but I now see that I was mistaken.

"Now about my work. I like it fine. It is very difficult, but anyhow it is a very interesting. I translate articles on aeronautics, aerodynamics, air frames, and so forth. Recently I have translated an article on boundary layers, and it was a hell of a job. I have a splendid boss. He (896) is a very interesting man, clever, talented, tolerant, and hands-on. We like each other and spend much time talking about various things. He knows literature and arts, and many other things. He is 44, single, and rather unhappy. I wish you could see him and talk with him.

"My health is okay. Sometimes when I am overtired I have headaches but it is not very often. I work much and with pleasure. My boss knows the language, though he cannot speak very well. I help him to learn the language better and often talk with him in the language.

"Our hibernator sends you her best regards, and wishes to see you as soon as possible. All our friends send you their regards. My husband hopes you will like him when you come home.

"With all my love, Evelyn.

"P. S. I have started writing poetry in this language. Next time I shall send you a sample. 21856."

The next letter is handwritten in English.

"Dear Dad:

"I wish you many happy returns. Many thanks for the parcel, and all you sent us. (897) It all came in very handy. Daddy, dear, I am missing you so much. You just cannot imagine how much I need you.

Defendant's Exhibit F.

"It is about four months since I have married, and to me it seems it is eternity. So dull it sometimes is. In general he is a good chap, but he isn't you, or even like you. I have already got used to the fact that all people must remind you somehow, but in this case it isn't so.

"I have got a job, and a very interesting one. I work as an engineer referent in aviation. My boss is a very good man, and we like each other. We often talk about all sorts of things. He is a bit like you, though not so broadminded and not a very great erudite, though very clever. Goodbye. Forgive me please for the awful letter. I am in a great hurry as I have to go to work. With all my love, Evelyn."

With it were these pictures (indicating), which I would like to show to the jury.

(The pictures were exhibited to the jury.)

(898) Mr. Fraiman: We have no questions.

The Court: I should like to ask for the record, certain of the letters that were read were in English?

Mr. Fraiman: That is correct.

The Court: Were they typewritten?

Mr. Fraiman: No, your Honor.

The Court: Were the originals typewritten?

Mr. Fraiman: I believe that one of them was. The remainder, I believe, were in longhand.

The Court: Mr. Scott thinks that all the English letters were in longhand.

The Clerk: There is one here typewritten, that is in English.

The Court: Yes; English letter.

No cross?

Mr. Fraiman: No cross, your Honor.

Mr. Tompkins: Your Honor, at this time the Government would like to offer into evidence Government's Exhibit No. 100 for identification.

Government's Exhibit 100.

Now, as I understand it, the defense has no objection to the form?

In other words, if a witness were present he would testify that the exhibit is compiled from (899) records kept in the ordinary course of business of the Department of Defense.

Exhibit—the exhibit is a document which was compiled at the request of the Department of Justice, subsequent to June, 1957, the Department of Defense assigned personnel to institute a radio-monitoring operation at times, and on frequencies indicated by the Department of Justice.

Those frequencies, your Honor, tie in with Government's Exhibit No. 98 in evidence, which was the radio schedule.

The Court: What do you mean by saying it ties in?

Mr. Tompkins: Well, the exhibit, the same frequencies were monitored on 15th of July, and the 4th of August.

On the 15th of July, the frequencies set forth in Exhibit No. 98 were monitored on the same days as set forth in Exhibit No. 98, and the same for August, either the frequencies or the alternate frequencies and the exhibit just shows the result of the monitoring in—and the receipt of messages in five digit blocks.

The Court: That is to say, the operation of (900) those frequencies but not the result of the operation?

Mr. Tompkins: Not the result. It just shows the results set forth in five digit numerals.

It doesn't show the translation or anything else.

The Court: Well, that is what I mean.

Mr. Tompkins: That is right, sir.

Mr. Donovan: The defense would object, your Honor, to the admission of this into evidence, in the first place, on the ground that it was obtained as a result of an illegal search and seizure.

Government's Exhibit. 100.

The Court: What was, the monitoring?

Mr. Donovan: The monitoring flowed from a document obtained at the Hotel Latham.

The Court: You mean that the monitoring, an independent operation, followed a plan or a purported plan or scheme that appears on Exhibit No. 98, so that it isn't the monitoring that you are objecting to, is it?

Mr. Donovan: It is the exhibit, your Honor, it would never have been done and this would never have existed if it were not for this Government's Exhibit seized at the Hotel Latham.

(901) The Court: That is if Exhibit No. 98 had not been found, then there would have been no monitoring. I guess the jury understands that.

Mr. Donovan: That is correct, your Honor.

The Court: But I have already ruled, I think, that I consider Exhibit No. 98 admissible in evidence.

Mr. Donovan: I know, your Honor, and I am simply renewing our objection to this exhibit on the same ground, and as I would understand, it is overruled?

The Court: Yes.

Mr. Donovan: For the same reason.

Now, in addition, however, I object to its admission into evidence on the ground that there is no showing that this relates to this defendant and I specifically deny the tie-in asserted by the Government between the two exhibits on the ground that this exhibit shows the different call letters were actually used than are set forth in the earlier exhibit, and I ask that the Court examine the two exhibits, and I suggest that as a result, rather than concluding that what was obtained was a message being delivered in accordance with (902) schedule set forth in the earlier exhibit, that instead they simply picked

Government's Exhibit 100.

up some undecipherable message relating to what no one knows.

I respectfully direct the Court's attention to the fact that the call letters are entirely different from the schedule.

— Mr. Tompkins: If your Honor please, I want to point out that the frequency monitored in the July monitoring was the same frequency as set forth in Exhibit No. 98 in it—what is termed the basic sessions for the month of July, the call letters used are the call letters in the basic session of January.

Now, in the August message, the frequency set forth, is 14438, the schedule calls for 14440, and I think the difference of three or four one-hundred thousandth kilocycles—

In other words, you can secure the message, it is just a very minor variance.

The call signal again is, the call signal for January set forth in the alternate schedule. In other words, the frequencies are the same, the call signals are different.

(903) In other words, in both cases they have used the two January call signals, one which is on the basic schedule and one which is on the alternate schedule.

The Court: Whom do they refer, the call letters—

Mr. Tompkins: The sender.

The Court: Is it your position that this exhibit tends to prove anything?

Mr. Tompkins: Your Honor, all it does is corroborate the schedule that was found on the defendant and showed that messages were being sent in accordance with that schedule.

Mr. Donovan: I respectfully submit, your Honor, if it shows anything, it shows that such messages were not being sent in accordance with the schedule.

Government's Exhibit 100.

The fact that they turned in on the same frequency is no corroboration of anything. All that meant was that they were sufficiently proficient that they were able to know where to look to see whether or not such a message would be received.

There is no question about that.

The question is, did they find what they were (904) looking for?

I respectfully point out to your Honor, that this evidence is self-defeating in that it clearly shows on the face that the messages came from an entirely different party in that you do not have the call letters used that were set forth on the schedule.

Now, the fact that the same call letters were used in January, 1957 in this particular case or that they were used in 1943 by two other people has nothing to do with the matter.

The question is whether or not these messages were received in accordance with that schedule, otherwise, I respectfully submit that there is no relationship and no way can this be considered as relating to the defendant.

Mr. Tompkins: I should like to point out one other thing, your Honor, the time that these messages were received, set forth on the Exhibit 98—

The Court: In the first place, they are radio messages, aren't they?

Mr. Tompkins: They are radio messages in code.

In July the schedule shows the regular schedule (905) on the frequency that the July message was sent, the time, 2100 to 2200. The July message shows that it was monitored at 2212 or 12 minutes after that time.

The August message shows, and it is on the alternate schedule, 0530 to 0630, this is all Greenwich time, and it shows a receipt at 0646 or 16 minutes after the time set forth in the schedule.

Government's Exhibit 100.

In other words, the time, the frequency and the kilocycles—

Mr. Donovan: Your Honor, the second message shows that another message was intercepted during the same time.

Now, I submit that it is a matter of which the Court can take judicial notice that every day, every hour, every minute, that an amateur radio operator can pick up any number of messages in code that are being transmitted, and I respectfully state again that unless the Government is prepared to show that there is an exact tie-in between this schedule and the messages that were received, that the evidence is inadmissible, and I respectfully say that in this case their second exhibit has conclusively (906) knocked out the relevance of the first.

The Court: Let's see if we can agree to this much. Mr. Tompkins, do you agree that the utmost that this exhibit could establish would be considered in connection with Exhibit 98 of the defendant is shown to have been in possession of a schedule, that schedule, I think was in pencil?

Mr. Tompkins: That is right, sir.

The Court: On the days that you mentioned in connection with Exhibit No. 100, radio messages were transmitted which are consistent with the operation of that which is shown in 98?

Mr. Tompkins: That is correct, your Honor.

The Court: Beyond that, you cannot go—

Mr. Tompkins: I am satisfied with that.

Mr. Donovan: I respectfully suggest to your Honor that it is inconsistent.

The Court: Do you mind if I finish?

I will listen to you.

I want to get this understanding, if I can: So that the utmost that this exhibit can establish would be that consistency between the code, if that is what it

Government's Exhibit 100.

was, and the radio activity reflected in Exhibit No. 100.

(907) Mr. Tompkins: That is absolutely the only probative value that the Government feels, your Honor.

The Court: It does not proceed beyond that point, so far as the defendant is concerned.

Mr. Tompkins: That is correct.

The Court: Now, Mr. Donovan, what is your objection to that statement?

Mr. Donovan: My objection is that not only does it go beyond that point, but it never reaches that point.

This shows no consistency. This demonstrably shows a complete inconsistency. If you are looking for a man named John, you don't go around calling for Thomas. That is what has happened here.

The Court: It depends on whether John was known as Thomas also, you might do it.

Mr. Donovan: If in this case as I understand the Government's contention in July and August, these were to be the messages.

Now, so far as who was looking for whom we don't know, but I respectfully say that certainly it can't be demonstrated from these two exhibits that (908) there is a consistency.

Mr. Tompkins: If your Honor please, with the schedule we got the monitoring.

Whatever value that is, the Government offers it. I think it is consistent.

Mr. Donovan: These have been undeciphered; so far as we know, it might be a commercial from Bulgaria.

Mr. Tompkins: I haven't seen a commercial from Bulgaria in five digit figures.

The Court: I think upon the understanding which Mr. Tompkins agrees which the Court has undertaken

Government's Exhibit 100.

to state, the document may be received, and it is for the jury to say whether or not they consider it of any weight as a matter of evidence.

Objection overruled.

Mr. Donovan: Exception.

Mr. Tompkins: If your Honor please, at this time the Government would like the Court to take judicial notice in connection with Exhibit No. 98, that Greenwich Meridian Time in May and June was five hours after Brooklyn time.

In other words—

The Court: Is there such a thing as Brook- (909)
lyn time?

Mr. Tompkins: I guess I brought too sharp a focus.

The Court: I heard of Eastern Standard Time.

Mr. Tompkins: That is right, it was Eastern Daylight Saving Time in May and June and where on Exhibit 98, where it says 0330 to 0430, and it is in the alternate schedule, that it was ten-thirty P. M., the prior date, Eastern Daylight Saving Time.

The Court: Do you agree to that, Mr. Donovan?

Mr. Donovan: Whatever his point is, I have no objection to his making that.

The Court: Never mind what his point is, do you agree to his statement of fact?

He is asking me to take judicial notice concerning something of which I am quite ignorant. I am simply asking if—

Mr. Donovan: You are not alone in your ignorance, your Honor.

I am sure that if Mr. Tompkins says this is true, I am not going to contest it.

Mr. Tompkins: At this time, your Honor, the prosecution rests.

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Motions at Close of Government's Case.

(914) The Court: Let's understand this. The present motion is deemed to be a motion for judgment of acquittal, which has taken the place of the motion to dismiss under the Federal Rules?

Mr. Fraiman: Yes, sir.

Your Honor please, this is a motion for judgment of acquittal with respect to Count 1 of the indictment.

Count one charges in essence that—

The Court: I have got the indictment before me.

Mr. Fraiman: Count one charges a violation of Section 794(a) of Title 18, the substantive section. In order to constitute a violation, the defendant must transmit information relating to the national defense to a foreign government, either to the benefit of the foreign government or to the detriment of the United States.

The Court: That is the substantive crime.

What about the conspiracy?

Mr. Fraiman: This is a conspiracy to commit that offense.

The Court: Yes.

Mr. Fraiman: It is our contention, your (915) Honor, that the Government has failed to make out such a conspiracy with respect to the defendant, Rudolph Abel, in this case on the following reasons.

According to the Second Circuit decision by Judge Learned Hand in *U. S. v. Crimins*, 123 F. (2d) 271, decided in 1941, in order for an individual to be convicted of a conspiracy to violate a substantive statute, it must be shown that he was aware of each of the material elements that go to make up that offense.

For example, the example used by Judge Hand in that case, where a violation of Section 659 of Title 18 is alleged, that is a theft from interstate shipment, in order to prove the substantive offense of violating Section 659 it is necessary to show that theft itself and the fact that the material was stolen from interstate shipments.

Motions at Close of Government's Case.

It is not necessary, however, to show that the person who stole the merchandise was aware of the fact it was moving in interstate commerce. However, Judge Hand points out in order to be guilty of conspiring to violate Section 659 it must be shown that the individual not only conspired to steal the particular merchandise but he must have conspired to steal (916) it from interstate shipment.

That is, he must have been aware of the fact that the merchandise was moving in interstate commerce.

Taking that analogy over to the instant case, it is our contention there is no showing in the record of this case that the defendant Abel was aware of the fact that this was in fact a conspiracy, that he was aware that its object was to transmit matters relating to the national defense to the Union of Soviet Socialist Republics, the U. S. S. R.

Now, there may have been a conspiracy made out in this case. It may well be that Abel has been made out as a co-conspirator.

It may also be made out there was a conspiracy to transmit certain items to the Soviet Union.

However, there is nothing, not a single line of testimony in the transcript which shows an awareness on the part of the defendant Abel that this was a conspiracy to transmit matters relating to the national defense to the U. S. S. R.

The witness Hayhanen has testified that he was sent to the United States to commit espionage, and he indicated what he meant by the word espionage.

(917) The Court: And to assist Abel, don't forget that, Mr. Fraiman: To assist Abel in that purpose.

However, there is nothing in the record, despite the existence of numerous conversations between Hayhanen and Abel, numerous assignments that Abel allegedly gave Hayhanen, there is nothing in the record and there is not a single piece or real evidence in the record to indicate that Abel was aware of the existence of a conspiracy to transmit matters relating to the national defense to the U. S. S. R.

Motions at Close of Government's Case.

And it is on that ground that we respectfully move to dismiss Count one of the indictment. That is, there is no showing of this necessary element of a conspiracy—that is, materials relating to the national defense.

The Court: Have you stated the motion now?

Mr. Fraiman: With respect to Count One, your Honor.

The Court: Denied.

I think it is a question of fact for the jury.

Mr. Fraiman: Very well, your Honor.

With respect to Count Two of the indictment we move for a judgment of acquittal on the same ground (918) as our motion with respect to Count One.

The Court: Same disposition. Denied.

Mr. Fraiman: With respect to Count Three of the indictment, which charges a conspiracy to act as an agent of a foreign government in the United States without having registered with the Secretary of State, our motion to dismiss is based also on the *Crimins* case on the ground that there was no showing of an awareness on the part of Abel of each of the elements that went to make up the substantive offense which he is charged with conspiring to commit in Count Three.

The Court: You mean he was not aware of the requirements of the United States statute?

Is that what you mean?

Mr. Fraiman: There is no showing—

The Court: Since when is ignorance of the law a reason for granting a motion for judgment of acquittal?

Mr. Fraiman: With respect to a conspiracy, your Honor, we submit that unless the defendant is aware of each of the elements that go to make up the substantive offense of which he is charged to conspire to commit, he cannot be found guilty of conspiracy.

(919) The Court: Do you have any way of knowing what is in a man's mind or what a man is aware of other than by examining into his conduct?

Mr. Fraiman: Circumstances—

Motions at Close of Government's Case.

The Court: That is the only way you can tell, isn't it?

Mr. Fraiman: Yes, it is, your Honor.

The Court: Have you stated your motion?

Mr. Fraiman: With respect to Count Three, yes, your Honor.

The Court: Denied.

I think it is a question of fact for the jury.

Mr. Fraiman: At this time, your Honor, we would also like to move to dismiss certain portions of the indictment which we feel there has been no proof offered with respect to.

I should like to go through the entire indictment indicating those portions we believe should be stricken and because of the fact there is no proof offered with respect to them.

The Court: Yes.

Mr. Fraiman: With respect to Count One we respectfully move that the name Alexander Mikhailovich Korotkov be stricken from the indictment on the ground (920) there has only been one reference in the entire transcript to Alexander Mikhailovich Korotkov and that was back in the year 1948, the testimony of Hayhanen that Korotkov was the assistant chief of some division or another.

There is no other reference in the transcript to that individual.

The Court: What do you say, Mr. Tompkins?

Mr. Maroney: Without examining the transcript, with that in mind, your Honor, I couldn't say whether it is accurate or not.

However, it is our position that material should not be stricken from the indictment after evidence has been put in solely because of a failure to prove something which was not an essential element of a crime.

The Court: That isn't what he says.

He says that there is practically no proof. He says there is one reference to this individual, Korotkov, and that dates in the year 1948.

Mr. Fraiman: It does not refer to him in the context as a co-conspirator.

Motions at Close of Government's Case.

Mr. Maroney: I think in the context of Hayhanen's testimony and the position that Korotkov held (921) in Soviet intelligence at that time, which was the time when Hayhanen was first instructed, first received instructions to build a legend and come to the United States, and as I recall it, the testimony, Korotkov was in on those initial instructions to Hayhanen concerning the building of the legend preparatory to coming to the United States.

Mr. Fraiman: I don't believe the transcript will show that, your Honor.

The Court: What is that?

Mr. Fraiman: I don't believe the transcript will show that.

The only reference to Korotkov is page 42.

Mr. Maroney: I see the reference on page 42.

"Before you were transferred to Esthonia and on this first meeting, did you meet a Colonel Korotkov?"

And then he identified Colonel Korotkov as the assistant boss of P. G. U.

Mr. Fraiman: There is a further reference to Korotkov, your Honor, on page 62, where Hayhanen was asked whether he saw Colonel Korotkov and he said he didn't see him.

The Court: Well, "I met a Colonel Korotkov. He was the assistant boss of the P. G. U."

(922) Mr. Fraiman: Yes, sir.

The Court: I won't strike it. It may not be very convincing evidence but it is some evidence.

Mr. Fraiman: My next motion to strike, your Honor, is the words, "Documents, writings, photographs, photographic negatives, plans, maps, models, notes, instruments, appliances," from the first count of the indictment on the ground there has been no showing of conspiracy to transmit such items to the U. S. S. R.

The Court: As to "maps" there were some maps found in the hotel room.

I don't see anything about "models."

Motions at Close of Government's Case.

Do you agree there is no testimony as to models?

Mr. Maroney: No, there is none, your Honor.

The Court: Do you agree that the word "models" should be stricken?

Mr. Maroney: I do not agree it should be stricken, no.

The Court: Do you agree there is no testimony about it?

Mr. Maroney: I do.

The Court: Then what would you lose by striking the reference to it?

(923) Mr. Maroney: I don't think we would lose anything by striking the reference to it, your Honor, but I wish to state that we do not feel that a motion to strike on the grounds made by Mr. Fraiman with respect to this particular matter is an appropriate motion.

The Court: It is a failure of proof, that's all.

Mr. Maroney: That's right, and I don't think failure of proof as to a specific item in the indictment is a ground for striking.

The Court: Not that much of the indictment?

(924) Personally I think he is entitled to have that word "models" stricken.

Mr. Maroney: Very well, your Honor. We will not oppose it.

The Court: The word "models" is stricken.

Mr. Fraiman: Your Honor, with respect to the use of the word "maps,"

The Court: Yes. I don't know whether he used it. There were maps found in his room.

Mr. Fraiman: But there is no showing that the maps related to the national defense.

The Court: That is argumentative.

Mr. Fraiman: They were not introduced in evidence but the Government obviously had them in its possession.

The Court: They were, I think, of New York, Boston, San Francisco. I have forgotten.

Motion denied.

Next?

Motions at Close of Government's Case.

Mr. Fraiman: I think Mr. Maroney will stipulate that they were road maps that may be found in any gasoline station.

Motion denied.

Mr. Fraiman: Would your Honor rule with re- (925) spect to the items in there?

The Court: Such as?

Mr. Fraiman: "Documents, writings, photographs, photographic negatives?"

The Court: Denied as to those.

Mr. Fraiman: "Plans," your Honor?

The Court: Is there any testimony as to "plans"?

Mr. Maroney: I don't think there is any testimony as to the word, no, sir; but I do think that Mr. Hayhanen's testimony to the effect that they were looking for secret material, material of a military value, material that is not available to the general public, and Abel's assertions to Hayhanen that Rhodes would make a good agent because he had a brother employed in an atomic energy plant and those various circumstances that are present in this case, I think the terminology used in the indictment is appropriate in connection with the testimony.

The Court: Having in mind that it is a conspiracy and not a substantive crime as charged, I think that it can be argued that plans were within the scope of the conspiracy, although on a proper (926) request I should have to charge the jury there was no testimony that plans were specifically mentioned by any witness.

Mr. Fraiman: And we make a similar request with respect to the words "instruments and appliances."

The Court: That is denied.

Mr. Fraiman: I don't recall any testimony with respect to "appliances"?

The Court: We have some instruments that have been offered in evidence today.

Mr. Fraiman: None relating to the national defense, your Honor.

Motions at Close of Government's Case.

The Court: Is that so? Are you sure?

Why do you think these hollow containers were employed?

Mr. Fraiman: They might have been employed, your Honor—

The Court: Surely.

Mr. Fraiman: —for that purpose, but the containers themselves were not instruments or appliances, relating to the national defense.

The Court: Denied.

Mr. Fraiman: May we have the word “models” (927) stricken, your Honor, from wherever the word appears in the indictment?

It is repeated throughout the indictment.

The Court: Instead of striking it, wherever it appears, I would prefer that you ask the Court to instruct the jury that there is no testimony that “models” were referred to in the testimony of any witness.

Mr. Fraiman: Your Honor would make a similar ruling, then, with respect to “plans”, as I understand it?

The Court: Yes.

Mr. Fraiman: We move, your Honor, to strike paragraph 4 of Count 1 of the indictment in its entirety.

The Court: Denied.

Mr. Fraiman: May I explain the basis?

The Court: No. I know why you are moving, and I am denying it.

Mr. Fraiman: There is something that we haven't brought out before with respect to this paragraph 4, that I should like to bring to your Honor's attention.

That is that in the message which is Government's Exhibit No. 18 in evidence, which relates to the witness Rhodes, the message itself says that they did not know what Rhodes' employment was at that time.

The Court: Therefore?

Mr. Fraiman: Therefore there is no showing of an awareness of a conspiracy to induce members of the armed forces—

Motions at Close of Government's Case.

The Court: I don't know what you mean by an awareness. You have got to use common sense.

Now, don't exaggerate awareness beyond its proper meaning.

I am denying the motion.

Next?

Mr. Fraiman: With respect to Paragraph 6 of Count 1, your Honor, we move to strike the entire paragraph 6 on the ground that there has been no showing of conspiracy to fashion containers.

The Court: The jury can decide that there was, if they choose. They have seen the containers and they can reason the containers didn't make themselves.

Denied.

(929) Mr. Fraiman: With reference to Paragraph 10 of Count One, your Honor, I would move to strike so much of Paragraph 10 as relates to the engaging in acts of sabotage against the United States.

There is absolutely no testimony with respect to that in the record.

The Court: I think that Hayhanen testified on that subject, didn't he?

Mr. Maroney: He testified, as I recall it, that he was instructed in the event of war—

The Court: Each one should look out for himself.

Mr. Maroney: That's right, and should continue transmitting information back to the Soviet Union.

Mr. Fraiman: That does not constitute acts of sabotage.

It would be doing exactly the same as he was supposedly doing before the war.

The Court: I think that is reasonably within the scope of the instructions concerning which he testified as to his conduct in the event of war. I think that is a reasonable application of his instructions.

(930) Mr. Maroney: I think he also pointed out that it was made known to him in connection with those instructions that when he got back to the Soviet Union after such

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a war, if a war eventuated, they would want to know what he had done while here in the United States.

The Court: Yes. I do remember that.

Mr. Fraiman: With respect to Count Two of the indictment, our motions are similar to those we made with respect to Count One; that is, to strike the name Korotkov; to strike the terms "documents, writings, photographs, photographic negatives, plans, maps, models, instruments, appliances and notes" from the indictment and to strike Paragraph 4 of Count Two and to strike Paragraph 6 of Count Two.

The Court: You don't need to repeat it. It is the same motion.

Same ruling.

Mr. Fraiman: With respect to Count Three of the indictment, we move to strike the name Korotkov from among the co-conspirators.

The Court: Same disposition.

That is the same man, isn't it?

Mr. Fraiman: Yes, it is, your Honor.

(931) I respectfully except to your Honor's ruling.

The Court: Very good.

Now, have you stated your motions?

Mr. Fraiman: Well, we did reserve, your Honor—your Honor, I gather, reserved to us the right to move to strike certain testimony in the event there is not a showing of a conspiracy; but in view of your Honor's ruling that a conspiracy has been shown—

The Court: Now, please. My ruling is that enough has been shown to constitute the whole subject of conspiracy a question of fact for the jury to pass on.

That is my ruling.

Mr. Fraiman: Yes, your Honor.

We should like to renew our motion—I can't particularize the instances in the record at this time—but we should like to renew our motion to strike the various portions of the testimony that were permitted throughout the trial and

Rulings on Requests to Charge:

various exhibits that were permitted to be introduced in evidence, on the ground they are not binding on the defendant because of failure to show he was part of the conspiracy.

(932) The Court: You understand, of course, that motion has to rise or fall on the determination of the question whether the conspiracy was shown; you realize that?

Mr. Fraiman: I realize that.

The Court: Denied.

Are there any other motions?

Mr. Fraiman: That completes our motions, your Honor.

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(934) The Court: Mr. Donovan, I have received the defendant's requests to charge.

Do you wish me to state before you begin your summation to the jury how I propose to deal with those requests?

Mr. Donovan: Even before that, your Honor, although I was not in court yesterday afternoon, Mr. Fraiman tells me that we have not yet formally (935) rested; and I should like to do that at this time and renew the motions which we made at the conclusion of the Government's case.

And then I would appreciate your Honor's ruling on our requests to charge.

The Court: The defense rests.

Does the Government rest?

Mr. Tompkins: That is correct, your Honor.

The Court: With regard to your requests, Mr. Donovan, number one will be covered in the general charge.

Number two is repetitious.

Number three will be dealt with in the general charge.

Number four is repetitious.

Number five will be dealt with in the general charge.

Probably number six will be granted.

Number seven will be dealt with in the general charge.

Rulings on Requests to Charge.

Number eight is repetitious.

Number nine will be dealt with in the general charge.

Number ten will probably be granted.

(936) Number eleven will be dealt with in the general charge, as will number twelve, number thirteen, part of number fourteen—all but the last paragraph will be dealt with in the general charge.

The same as to number fifteen.

The same as to number sixteen.

As to the last three requests, the concluding paragraph in each will be denied.

Seventeen will probably be granted.

Number eighteen is deemed to be too abstract as is number nineteen.

Number twenty will probably be granted.

Number twenty-one will be covered by the general charge, on the subject of reputation evidence.

Number twenty-two, all but the final paragraph will probably be granted. That will be denied.

Number twenty-three will probably be granted, pretty much as drawn except as to the second paragraph which will be changed as I think it should be.

Number twenty-four will be dealt with in the general charge.

Number twenty-five will probably be granted, (937) if necessary. I cover those matters in the general charge, of course.

The first paragraph of 26 I shall probably grant, perhaps in a different form.

Number twenty-seven I shall probably grant.

Mr. Fraiman: Your Honor, may we respectfully except as to those charges as to which your Honor has indicated he will deny our requests to charge?

The Court: I doubt if this is the time to do it, but if you feel better in stating your exception, do so.

I think all exceptions should be noted to the charge after the charge has been delivered.

Summation for the Defendant.

Mr. Fraiman: Your Honor, we have one supplemental request we would like to submit at this time.

We don't ask your Honor to rule on it at this time unless your Honor wishes to.

(Counsel hands paper to Court.)

The Court: I will consider it.

I understand that you do not ask for a ruling at this time.

Mr. Fraiman: That is right.

(938) Has your Honor ruled on our renewal of our motions, which we make at this time?

The Court: You mean that was made this morning?

Mr. Fraiman: Yes, your Honor.

The Court: The motions are denied.

SUMMATION FOR THE DEFENDANT:

Mr. Donovan: May it please the Court: Ladies and gentleman of the jury: This trial has been an experience I know for me, and I feel sure for you as well. Like all experiences, they are meaningful when we can look at them with the benefit of hindsight.

You will remember that when this trial commenced that I spoke briefly to you about what was your conscientious duty as a juror. I explained that your duty is to conscientiously determine the facts and find whether or not this man named Abel has been proved guilty by evidence produced in this court before you of the specific charges made against him.

I explained to you that this is not a trial of Communism, and it is not a trial of Soviet Russia.

(939) The issue I have just stated is the sole one before you.

Now, having understood that situation, you and I have been waiting to see what evidence was produced against this man. We have now seen all that evidence; we have seen and heard all the witnesses.

Summation for the Defendant.

We had an opportunity to evaluate them to see whether or not each one of them was telling the truth, what his motives were on the one hand to tell the truth or what his motives were on the other hand to try to tell whatever story would be best designed to save his own skin.

Now, it is terribly important in this particular trial that you have a clear concept of the function of the jury in America and under the common law in Great Britain from which our laws derive.

We believe that under our trial by jury system that it is the best system ever devised for arriving at the truth.

Why is your function so important? You might say to yourselves, "His Honor, the Judge, knows all the law applicable to the case; (940) he has been trained for many years to evaluate evidence. Why, then, shouldn't cases such as this simply be left to the lawyers and the judges?"

Now, the answer is that from the time of Aristotle many centuries ago, ordinary citizens are not content to leave these questions to the lawyers and the judges with their legalisms and their legal niceties.

In the United States, at the time of the American Revolution, our country was welded together among the intellectuals in the United States by a series of papers called "The Federalist," written by a group of men that included the best legal minds in the United States.

But the cause of the American Revolution was best sold to the ordinary people not by "The Federalist," but by a pamphlet written by a man named Thomas Paine called "Common Sense."

Now, all that I am going to ask you to do in this particular case, because of certain legal niceties and so on, is that while on the one hand you receive your instructions as to the law from the Judge, I ask simply that you use common sense in considering this case.

(941) You have the right, and you are the only people that have the right in this court room, to come back with a verdict of guilty or not guilty on each specific count.

Summation for the Defendant.

That right for you to come back with that verdict after hearing the Judge was established for you back in 1735 in this very city in the trial of a man named Peter Zenger. In that trial a great lawyer named Andrew Hamilton defending Peter Zenger won for you the right to come back with a verdict of guilty or not guilty on the entire case after you consider the law and the evidence.

Now, all that I am going to ask you to do is to review what we have listened to for the last couple of weeks and simply ask you to use common sense in reaching your verdict.

Now, first of all, what was charged?

As you know, there are three counts in the indictment. Now, the heart of the first count, and I read it to you, is that this man "did unlawfully, wilfully and knowingly conspire to communicate, deliver, and transmit to a foreign government, to wit, the Union of Soviet Socialist Republics, and representatives and agents thereof, directly and (942) indirectly, documents, writings, photographs, photographic negatives, plans, maps, models, notes, instruments, appliances, and information relating to the national defense of the United States of America, and particularly information relating to arms, equipment, and disposition of United States Armed Forces, and information relating to the atomic energy program of the United States."

Now, this is the charge.

So Count One, which is the only capital count, Count One charges in summary a conspiracy to transmit national defense information and atomic energy information.

Now, I ask you this question right now because I am going to be asking it of you repeatedly as I go through this case: What evidence of national defense information or atomic information has been put before you in this case?

When you and I commenced this case, certainly we expected evidence that this man is shown to have stolen great military secrets, secrets of atomic energy, and so on. Now I ask you, looking back over the past couple of weeks,

Summation for the Defendant.

what evidence of such information was ever produced before you?

Now, remember it is essential for you to convict that you be able to say that that man has been proved guilty beyond a reasonable doubt of transmitting such information.

The Court: Mr. Donovan, isn't the charge a conspiracy?

Mr. Donovan: The charge is a conspiracy, your Honor, and I have repeatedly stated—

The Court: The charge doesn't involve a substantive offense.

When you undertake to tell the jury what the law is, be accurate in your statement, please.

Mr. Donovan: I thought, your Honor, that I made clear that it was a conspiracy. If I omitted it, in that one sentence, I am sorry.

It is a conspiracy but it is not a conspiracy to assassinate President Eisenhower; it is not a conspiracy to do five hundred other things.

The only reason why this particular conspiracy is punishable by death, if the Court so decided, is because it is a conspiracy to transmit military information or information affecting the national defense. This is what has been charged (944) here:

I am simply asking you to keep in mind what evidence of that has ever been produced in this case?

Now, the second count of this indictment deals with gathering such information, in effect, in a conspiracy. So the first is a conspiracy to transmit such information; the second is a conspiracy to gather such information.

The third count deals with his alleged failure to register in the United States as an agent of Soviet Russia.

Now, remember that this indictment is not evidence. It was only handed up after one side was heard without cross examination, and remember that until the man is proven guilty he is presumed under our law to be innocent, so he carries that presumption of innocence of this crime throughout this case.

Summation for the Defendant.

Now, before I do review this evidence with you, I want briefly to ask you one common sense question and that is, would you just briefly compare in your own minds the evidence that you have about this man, Abel, what kind of man he (945) is, and compare that evidence with what you know, by now, of his two principal accusers whom you saw testify in this case.

In the first place, let's assume for the moment—let's assume—that the man is what the Government says he is. Let's assume that.

In the first place, it means that such a man was serving his country on an extraordinarily dangerous mission. We, in our armed forces, only send on such missions the bravest, the most intelligent men that we can find.

Every American who took the witness stand in this case who personally knew the man while he was living here, while put on the stand for another purpose, every one of them became a character witness for this defendant. You heard those men one after the other testify. "Did they know anything about him?"

"No."

Meanwhile, yesterday afternoon, you had read to you these letters from the man's family. You could judge those letters, I won't bother you by repeating them again. Obviously they painted the picture of a devoted husband, a loving father, (945-A) in short, an outstanding type of family man such as we have in the United States.

(946) So, on the one hand, assuming that all this is true, you have a very brave patriotic man serving his country on an extraordinarily hazardous military mission and who lived among us in peace during these years.

And, on the other hand, you have the two people that you heard testify as his principal accusers. Hayhanen, a renegade by any measure. Originally there had been talk about Hayhanen being a man who, and I quote, "defected to the West" and you might have the picture of some high-minded individual who finally chose freedom and so on.

Summation for the Defendant.

You saw what he was. A bum. A renegade. A liar. A thief.

You could just run down the adjectives to describe such a man.

He was succeeded by, so far as my knowledge would go, the only soldier in American history who has ever confessed to selling out his country for money.

These are the two principal witnesses against this man.

Now, let's turn in more detail to this man (947) who said that his name was Reino Hayhanen. You will remember that in my opening statement I asked you to watch that man carefully, observe him. I pointed out to you that if what the Government says is true, the man was trained to live a life of deception; so he is a trained liar who was being paid by Russia to live that life; so he is a professional liar. And now, as you know and as he testified, he is being paid by our Government at the present time.

Now, the prosecutor will tell you that in order to convict such people it is necessary to use such witnesses and so on. However, I ask you, in evaluating that man's testimony, to constantly keep in mind is he telling the truth or is he telling not only lies but the lies which are important enough that they may save his own skin.

From the evidence before you I say that you should conclude that Hayhanen is a liar, a thief, a bigamist and who, while he says he was on an undercover espionage operation—

The Court: I will have to interrupt you, Mr. Donovan. I don't like to do this.

Whether the man you are talking about is a (948) bigamist or not depends upon the laws of Russia concerning the dissolution of marriage, and there is no evidence in the case on that subject.

Mr. Donovan: I attempted to ask the man about it, your Honor, and I was overruled.

The Court: There is no evidence in the case as to whether he is a bigamist, if you please.

Summation for the Defendant.

Mr. Donoyan: The man is living, presumably at the present time, with this Finnish lady whom his Honor permitted me to refer to, as being numerically correct, wife No. 2. ♦ ♦

Now, with respect to what this man did while he was here, our cross examination consisted of what a physician would call a biopsy, which is to simply remove a small piece of tissue to see whether it contains indications of a disease that would affect all related tissue. To do this, we took this segment of his life among us.

In Newark, New Jersey, between the dates of August, 1953, and December, 1954, I investigated his life over there and then on the stand I questioned him about it.

Now, surely we can agree that from the account which was finally forced from the man's lips—(949) surely, No. 1, you can conclude that if the man was supposed to be over there on an undercover espionage operation he made every mistake that could possibly be made.

An undercover espionage operation to be successful must be done in such a way that you become faceless in a crowd. You avoid attention.

This man did everything possible to attract attention. His testimony was that he leased that shop for a photographic studio. He stayed there a year, never opened such a studio and, instead, he spread glass wax over the windows.

You heard him testify that he was living there with this Finnish lady, drinking vodka by the pint, and at least once the police and an ambulance were called because only two of the rooms were splattered with blood.

Now, with respect to the Finnish lady, you heard me ask him whether he recalled an incident in the bakery next door wherein he bought a loaf of bread, then threw it on the floor and ordered the woman to pick it up. You heard his answers to that.

He couldn't recall such an incident.

I specifically asked him, "Do you deny that it (950) occurred?"

Summation for the Defendant.

He never denied it. Never denied it.

I say to you, you have to conclude from that cross examination of that witness that the incident did occur and that either the man was lying and trying to be evasive before you on this stand or else when it happened he was so drunk that he doesn't remember to this day whether it ever did happen. Those are the only conclusions you could arrive at.

While this kind of a life was going on, you and I are being asked to believe that the man was a lieutenant colonel in Russian military intelligence.

At one point, with respect to the Finnish lady, although he admits that he left his wife and son in Russia, at one point he seemed to refer to the Finnish lady as part of his legend.

When the case began, I thought that he was simply afraid to go back to Russia. By the time he finished his testimony, I think he was more afraid to go back to his wife.

Now let's assume not only the miserable character of this man; let's assume the sordid life (951) that he led here. Nevertheless, you are left with the basic question: Assuming all that, is the man's basic story true?

He was here for some reason. We know that.

Furthermore, he used all of these fantastic methods of communicating with someone. At times he said he used these drops and hollowed out bolts and so on to communicate with the defendant.

One minute after he testified to that, he was telling you he met him every week and they used to go for drives for an hour.

If he met him every week and went for drives by the hour, what would be the object of communicating with him through this melodramatic, boyish device?

(952) Now, except for communicating with Abel, he used all of these devices he testified to, to communicate with a group of nameless, faceless people whom he would only describe as "Soviet officials." They were never identified by name, or rank or any other description.

Summation for the Defendant.

Now, we have examined hundreds and hundreds of pages of testimony in this case. Now, as you know, the man was led through, and I mean led through, hundreds of pages of testimony concerning his activities.

He told what I think could fairly be characterized as a well-rehearsed story. In two places he was asked, why did you come to America. I came to America to help Mark in espionage.

In another place he is asked, what kind of information were you trying to get, and his answer was virtually out of the law book on the statute involved, was that it was for affecting the national security of the United States.

Now, except for those two tiny threads spoken out of as miserable a witness as you ever would put on the stand, except for those two tiny threads, there is no evidence in the case to information (953) pertaining to the national defense or atomic energy secrets.

There is no evidence in the case.

Now, it is on that kind of evidence that you are being asked to send a man possibly to his death. You would only kill a dog on evidence that he had bitten.

I say to you, bear in mind the specific conspiracy charge, of conspiracy to obtain national defense secrets, including atomic energy secrets.

Now, I ask you where is that information?

Now, let's review a few things of what this man Hayhanen says that he did in furtherance of this conspiracy.

He went out to Colorado to find a man whom he never met to this day.

He went down to Atlantic City to find another man; he never met up with him.

He went up to Quincy, Massachusetts to locate another man and to date, to this day, he is not sure that he found the right man.

He was told, he says, that he should open a photographic shop as a cover. He never opened the shop.

(954) He was told to learn the Morse code; he never learned the Morse code.

Summation for the Defendant.

By the time that man got through, including the fact that he was given money to give to a woman, Mrs. Sobell, but he never met up with her and he pocketed the money, the five thousand dollars, for himself.

Now, by the time that man got through telling his story, all that I could think of was that new best-selling book about children, which is entitled "Where did you Go? Out. What did you do? Nothing."

If that man was a spy, history will certainly record that he is the most fumbling, self-defeating, inefficient spy that any country ever sent on any conceivable mission. It is virtually an incredible story and we are to believe that this is a lieutenant colonel in Russian military intelligence, sent here to obtain our highest defense secrets.

That bum wouldn't have private first class stripes in the American Army.

However, rather than dwell on, at great length, that man's testimony, which I say to you proved absolutely nothing on this point, I want to (955) recall to your minds what is the most significant evidence that the man did give. He has told the truth and he has told it within the last six months to the F. B. I.

You will recall that at the conclusion of his cross-examination I asked him whether or not he had given this statement to the F. B. I. in late May, in early June of 1957. He said he did. He said he gave it in a hotel room here in New York.

Now, let me read this again to you very carefully and remember this is the Government's own document. Some argument was had about translation and the Government furnished me with this translation.

Now, let me read to you what the man told the F. B. I. in late May and early June of this year.

"I resided and worked in Finland from July, 1949 to October of 1952. There I received my American passport and arrived in New York in October of 1952. I did not engage in espionage activity and did not receive any

Summation for the Defendant.

espionage or secret information from anyone during my stay abroad, neither in Finland nor in the United States of America."

Now, this is the man's own statement to the (956) F. B. I., made here in New York City in late May and early June of 1957."

And it is on this man's testimony that you are supposed to convict a man of a capital offense.

It is ridiculous. That statement, did you notice, was never cleared away on any re-direct examination.

To this day, that statement remains in this case as the man's own testimony. It is a complete exculpation of this defendant and no explanation of it has ever been offered to you.

Now, I say to you that that is the principal thing that you should remember when you think of Hayhanen's testimony as a witness.

Now, what about the rest of the evidence?

Sergeant Rhodes appeared. You all had an opportunity to see the type he was: dissolute, a drunkard, betraying his own country. Words can hardly describe the depths to which that man has fallen.

Now, remember that Rhodes testified he never met Hayhanen, he never heard of him, he never met this man, the defendant, he never heard of him, he never heard of any of the conspirators named in the (957) indictment.

Now, meanwhile he told in detail here his own life in Moscow, selling us out for money and how is this related to this defendant?

Those events in Moscow occurred two years before Hayhanen says Abel sent him to locate a man named Rhodes, two years.

How did these relate to this man? The answer is, they don't relate in any way.

Now, it is on evidence of that kind that you are being asked to convict this man.

Summation for the Defendant.

Now, I say to you that you heard pulled in by the ears some reference to Mrs. Sobell, whom neither the defendant nor Hayhanen ever met and who Sobell is and what he spied about.

Then, you see pulled in by the ears this man in Moscow two years before this defendant is supposed to have even told Hayhanen to find out and you hear that.

Now, this is the kind of evidence that is before you to send this man possibly to his death.

Where is the evidence of information relating to the national defense and of atomic energy?

The answer is, that if there is any such evidence (958) it has not been produced before you. If they had a case on it, it hasn't been made before you and you have to pass on this specific case and on the evidence which has been put in this case.

Now, I say to you that with respect to any references to Mrs. Sobell, any references to this sergeant in Moscow, you have heard condemned for the last some years what was called guilt by association. I say to you in this case, if you find the man guilty it would be guilt by non-association. This defendant never met any of these people.

With respect to the actual messages that have appeared before you decoded, I have them here.

Now, I ask you to look at these decoded messages and see for yourselves whether they relate in any way to national defense information or atomic energy.

(959) "Nobody came to meeting either eight or nine at 2030 as I was advised he should. Why? Should he be inside or outside? Is time wrong? Place seems right. Please check."

I submit to you that on this evidence you could reasonably conclude that there is or has been some kind of a conspiracy but that isn't the question.

It isn't a question of whether there has been some sort of conspiracy going on.

Summation for the Defendant.

The question is did they prove this specific conspiracy charged and to do that they must prove that it is a conspiracy to transmit and to gather national defense information, military secrets, atomic energy secrets, and things of that kind. There is no evidence in this case that that occurred.

Now, it is very important that you realize that in this case you are not serving your country and you are not fighting Communism to convict a man on insufficient evidence.

You are only serving your country and you are only fighting Communism if you bring in a just verdict based upon the individual consciences of (960) each one of you.

I say to you that if after this case is all over you want to live with your neighbors and with yourselves, you must exercise your now consciences to reach a just verdict.

Now, it may seem strange to you that the United States provides this kind of defense for a man like this.

In an affidavit that I submitted in an earlier proceeding in this case in connection with the search and seizure in the Hotel Latham, I said at the end:

Abel is an alien charged with the capital offense of Soviet espionage. It may seem anomalous that our constitutional guarantee protects such a man. The unthinking may view America's conscientious adherence to the principles of a free society as altruism, so scrupulous that self-destruction must result. Yet our principles are engraved in the history and the law of this land. If the free world is not faithful to its own moral code, there remains no society for which others may hunger.

I ask you to remember that as you weigh your (961) verdict and I ask you to exercise your individual consciences as to whether or not this man was proved by evidence in this court guilty beyond a reasonable doubt of the specific crimes charged, and I ask you always as you listen to the prosecutor, as you hear the charge from his Honor, the Judge, and then as you deliberate this question,

Summation for the Government.

to ask yourselves one final question, where was the information affecting the national defense of the United States?

Ladies and gentlemen of the jury, if you will resolve this case on that higher level so that you can leave it with a clear conscience, I have no question but that certainly on Counts One and Two in this indictment, you must bring in a verdict of not guilty.

Thank you.

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(963) SUMMATION FOR THE GOVERNMENT.

Mr. Tompkins: May it please the Court; Ladies and gentlemen of the jury:

Before I get into my summation I certainly want to thank you for your patience and the courtesy that you have shown to counsel on both sides. There have been some trying days, but you have been more than patient, and I am most appreciative.

Now, in my opening I think I made a solemn promise to you that the Government would do everything to afford this defendant a fair trial, and I believe we have conducted ourselves that way; and I further pointed out that it wasn't the Government's aim to simply win a case but of far greater importance was that justice be done. In other words, that innocence not suffer nor guilt escape.

Now, you are going to hear me use the terms "undisputed" and "uncontradicted" many times during my summation because I can think of no substantial fact that the Government has presented to you for (964) your consideration that has been or was attempted to be contradicted.

Now, penalty was brought up briefly this morning. You were asked about that prior to your being sworn, and each and every one of you said that you could decide the case on the evidence without consideration of penalty.

The penalty is not a matter for the defendant nor for the Government. That is entirely up to his Honor.

I just want, mainly because it came up this morning, to just talk very briefly about conspiracy. In my opening

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I said simply that it was an agreement, a partnership in crime, if you will, and that the accomplishment of one overt act completes it; that it need not be successful nor that the overt act in itself need be a crime.

Now, this morning counsel referred to the fact this wasn't a conspiracy to assassinate President Eisenhower, so let me use that simple example.

If we agree—two persons agree to assassinate the president and one of them procured a gun, that would be all that you needed to complete the crime and it need not be completed to be a crime. (965) In other words, we don't have to stand idly by until you have a corpse on your hands. And that is this case. We don't have to stand idly by and permit an individual to commit espionage, to get our secrets. We are not powerless in that case. We may intervene. We may prevent the consummation of the crime.

Now I want to talk briefly about Reino Hayhanen who was referred to this morning as a trained liar. In my opening I think I told you that you could expect an attack, and you got it. "A trained liar; a professional liar. Trained liar."

The same training as the defendant but less time in the NKVD.

Hayhanen "a trained liar"; the defendant a brave, patriotic man serving his country on a hazardous mission. And, believe me, we intend to make that type of mission very hazardous.

He is a good family man and he is living well. His family is living very well in Moscow with, and if you read the letters, a summer home and servants.

Now, Reino Hayhanen appeared and testified and was subject to cross-examination—four days (966) on direct and cross. Counsel suggested that you watch his demeanor and I certainly hope you did. I certainly hope you watched how readily he answered the questions, whether they were personal questions that reflected on him, on his personal

Summation for the Government.

habits. He admitted very readily that he drank. He admitted very readily that he took Mrs. Sobell's \$5,000, and nobody condones that.

I don't recall him admitting, however, that very important item that certainly must have affected his credibility: throwing a loaf of bread on a bakery floor.

Now, Hayhanen testified that in 1939 he was drafted into the NKVD.

He testified that he had been educated in the local schools and Teacher's College; that his work in the NKVD from 1939 to 1948 consisted mainly of counter-espionage; that he had been trained in the use of weapons; how to conduct surveillances. He had been checking on Russian nationals. He had been doing the ordinary duties of a counter-espionage agent.

(1967) And then in 1948 he was called to Moscow and assigned to espionage work. Where?

In the United States.

In preparation for that assignment he received instructions; he received further training and from 1948 to 1952 this man spent building a legend, false documents. You recall his testimony of going to Esthonia and the work he did there. You recall him going to Finland and building up that legend through bribery.

Subsequently he was recalled to Moscow, and then he is on his way to the United States.

Now, you recall that while he was there,—and I make this point because the Soviet officials were referred to as nameless, faceless this morning—you will recall that he testified while in Moscow he met a man named Svirin, and the next time he testified about Svirin it was out at the Prospect Park Subway Station, and you have here Government's Exhibit No. 12, the identification card of Svirin (indicating).

Mikhail Svirin, first secretary, U. S. S. R. His U. N. identification.

Summation for the Government.

Now, Hayhanen testified on direct that the purpose (968) of his coming to the United States was to procure secret information, military or atomic.

Now, a statement was read here this morning that he had said—and he signed and it was written by himself, there is no doubt about it—that he had not committed espionage in Finland or in the United States, and it was further represented that that was unchallenged.

After that statement was read, the record shows this:

Redirect examination by Mr. Tompkins:

“Mr. Hayhanen, what were you sent to the United States for?”

And then there is about two or three dollars' worth of vigorous objection, and finally, then, the witness was permitted to answer, and the witness said:

“I was sent to the United States as Mark's assistant for espionage work.”

Now, we had in Hayhanen, when he arrived here in 1952, a trained, skilled espionage agent. Thirteen years of experience in the use of weapons, surveillance, all of the techniques, microdot training, the use of devices, trained in the English (969) language, trained in the use of radio, containers, false documents.

Now, when he left he was given the location of drops. Those drops he set forth in his testimony before you as well as the drops that he set up after he arrived here,—the drops that were used to communicate with the Russian officials, Aske, and other members of the conspiracy.

Now, in 1954, he testified that he met the defendant and that subsequently he performed certain assignments for the defendant. He talked about the first one in an endeavor to locate a soldier, Roy Rhodes in Red Bank, and I am going to come back to that in a minute.

He then had another assignment up in the Boston area to locate a Swedish individual.

He then went to Atlantic City with the defendant to locate another individual.

Summation for the Government.

At the direction of the defendant he then went to Queens—I believe it was New Hyde Park—to surveil an individual there.

Before the defendant went to Moscow he instructed Hayhanen to set up a photographic studio in Newark, New Jersey.

(976) Now, I want to come back to Quebec for a minute. It was stated that Roy Rhodes was an accuser.

Roy Rhodes was nothing of the sort. Roy Rhodes testified that he did not know Hayhanen. He testified that he did not know Abel. And I believe that to be true. However, let's look at it in reverse.

Abel knew about Roy Rhodes and so did Hayhanen.

Now, the Government has an obligation to present evidence to prove the truth of the charge of the Grand Jury. We are not proud of Roy Rhodes. Nobody could be. You have heard his testimony, and he is an admitted espionage agent. We simply presented Roy Rhodes as he was, to corroborate the Quebec message; and his testimony, I might say, coincided with items contained in the Quebec message which the defendant had given to Hayhanen,—items that Roy Rhodes admitted he had given to Russian officials in Moscow.

Now, the Government brought out on direct examination that Roy Rhodes had furnished the Russian Government—the U. S. S. R.—with information while he was there.

(971) The Government brought out that he had been paid for that information, and I think cross examination only served to emphasize that.

Now, in other words, I think the defense discredited an already discredited witness, if that were possible after hearing his direct testimony. But the important thing about it is the facts contained in his testimony about the type of information that he furnished the Russians were not contradicted at any time.

Now, what I am saying to you is that Roy Rhodes was presented to tie in an individual, to show that that person

Summation for the Government.

was living with the Quebec message, and that fact should not escape.

Now, if he wasn't a weakling who sold out his country and was susceptible to use by this conspiracy by the Soviet Government, this conspiracy would not have sought him out.

Abel wasn't seeking decent citizens. He was seeking the Roy Rhodes because the decent citizens can be of no help to a Soviet conspiracy, but a compromised Army sergeant who has previously furnished information to the Soviets can be a very big help.

(972) When you consider that he testified, and it is unchallenged, that he furnished information to the Soviets on Army military personnel, on State Department personnel, you can consider the gravity of his offense and at the same time you can consider his potential value to the Soviets back here in the United States.

You give any Soviet agent an opportunity to get the habits and the training and the background and the connections of any individual in the military, whether he be a private or a general, and you have given him a lot to start from, believe me.

Now, I can't think of anything stronger than the seeking out of Quebec on an endeavor to get military information—information relating to our national defense. Quebec had been trained in code work, and he had so advised the Russians. And remember this: In the Quebec message, the Russians thought that he had a brother working in an atomic plant.

Now, let's talk for a moment about what transpired between the defendant and Hayhanen in connection with Quebec. Hayhanen said this: "Mark," referring to the defendant, "got instructions from (973) Moscow to locate an illegal agent," and in that message was that, in Hayhanen's language, "his wife has three garages in Red Bank, and we rode to Red Bank but we couldn't locate him."

So you have the defendant and Hayhanen trying to find Rhodes in Red Bank in November, 1954.

Summation for the Government.

The defendant then instructed Hayhanen to seek further instructions or more information from Moscow.

He subsequently instructed Hayhanen to go to Colorado to locate Rhodes through his relatives.

Now, this is the boss doing all of this with Hayhanen. Hayhanen and the defendant then went, and I think you can recall his testimony, to the Central Library and they got the Salida, Colorado phone book out, and they located Roy Rhodes' father's phone number.

The defendant then told Hayhanen to make the trip—you will find this in the transcript—because he has some other agents and he cannot go for a long trip.

Now, before the trip you will recall Mark gave Hayhanen the famous Quebec message on hard film, and you will recall that Hayhanen testified (974) he converted it into soft film and put it into a bolt and left it in his home; and when the F. B. I. checked, they found a bolt and they found in it a microfilm, and when the microfilm was translated we find the famous Quebec message giving the information concerning Roy Rhodes,—information that the Russians had obtained while he was in Moscow, which coincided with the facts.

The Court: Exhibit number, please?

Mr. Tompkins: Exhibit No. 18, your Honor.

Now, the defendant and Hayhanen had a conversation about this time in which the defendant said that the purpose of locating Roy Rhodes was, and I quote from the transcript—

Page 224, your Honor.

He said that, "Quebec could be a good agent because he and some of his relatives were working on military lands." He meant Quebec's brother who was working somewhere—I cannot remember exactly—but in some atomic plant.

Now, subsequently you will recall Hayhanen went to Colorado, made a phone call, as a result of which he learned that Rhodes was in Tucson, Arizona; that on the phone he

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talked with a feminine (975) voice; and you subsequently heard Arlene Brown testify to receiving a phone conversation about this time and that the voice had a foreign accent.

Subsequently the defendant told Hayhanen, and this is before the defendant's trip to Moscow, that he would try and locate Quebec on the way to Moscow.

After he returned from Moscow he told the defendant, or he told Hayhanen, that he had failed.

Now that I have mentioned the trip to Moscow, I would like to discuss it for just a minute. Reino Hayhanen said that the defendant had taken a trip to Moscow.

Can that be corroborated?

Harry McMullen, the superintendent at 252 Fulton Street, testified that the defendant was away for about the last five months of 1955.

You check the rent payments of 252 Fulton Street. You will see that the only time since the defendant rented it in December, 1953, and took possession in January, 1954, that the only time there are any arrears is during that period, a break in the rent payments. And if you check the bank deposits and withdrawals you will see, in (976) June a withdrawal of a thousand dollars, and the end of the year, beginning of 1956, you will see a deposit of six hundred.

Look at the rest of the deposits in there and you will find—and withdrawals—and you will find that they are minor.

Then you recall the letter from the daughter in the pencil concerning which I think a fair interpretation would show that her father had recently been home. That letter was in January, 1956.

(977) Now, I would like to talk a little bit about the Prospect Park bolt because I think, again, it is strong corroboration of the testimony of Reino Hayhanen. The Prospect Park bolt.

You will recall Hayhanen said before he left this country this year he had noticed that the drop in Prospect Park had been cemented over, that it had been sealed up. And that location was divulged to the Federal Bureau of Investigation.

Summation for the Government.

You heard the testimony of the F. B. I. agent to going to that location, to finding it, to chipping away the cement, to the finding of the bolt.

You heard the F. B. I. agent from the laboratory in Washington, testify that when he opened the bolt there was a message in it, a typed message.

And that brings me to one of the most important items of proof in the case, this typewriter (indicating).

Who placed a typewriter definitely in Abel's possession?

Who was the person who testified that it was Abel's typewriter?

I do not even think the defense would complain about this. Of all people, one of the defendant's (978) character witnesses, he testified that he got this typewriter—he gave you the serial number—from Abel and he turned it over to the F. B. I.

And you heard Mr. Webb, special agent Webb, testify to the typewriter examination.

And I think the drops were referred to as "silly drops."

Who do you think was using the "silly drops" in Prospect Park for a message?

The defendant.

You heard Webb testify that the message contained in that Prospect Park bolt had been typed on this typewriter which belonged to the defendant.

Now, what other corroboration did you have concerning the typewriter?

Mr. Tribelhorn testified that he had received a letter from the defendant. Mr. Webb said that letter had also been typed on this typewriter; and then you recall in Exhibits 29 and 28, the one that dealt with the use of "vacuum board for making matrices, and how to make microdots," that Hayhanen had testified he had gotten from the defendant and put in his house and the Bureau found these in his home, these two documents (indicating) were typed (979) on this typewriter. (Indicating). The defendant's typewriter.

Summation for the Government.

I think it is overwhelming proof.

Now, you will recall that a little newsboy, a little seventeen-year-old newsboy, came in here, a little kid with red hair and freckles, and he testified to getting a nickel in change, that he dropped it, that it came open.

One of those trick nickels that you can buy most any place, except that the ones that you buy most any place don't have microfilm in them. And the boy immediately turned it over—after it opened and he saw what was in it—very alertly to a Brooklyn Police detective who turned it over to the F. B. I. Remember, that was found by Jimmy in June of 1953. The message was dated December, and contained congratulations on an arrival, a safe arrival.

Just remember that Hayhanen arrived here in October, 1952.

The message said, "We have sent \$3,000."

You recall Hayhanen's testimony he had requested money, and he testified that under that lamp post up in Fort Tryon Park, in drop number two, he had (980) picked up \$3,000.

Now, this nickel message had nothing whatsoever to do with Hayhanen, was never in his possession, but I say that it is very strong corroboration of the truth of his story.

Now, the message further said that money would be sent for cover; and just remember this. Hayhanen discussed with the defendant the setting up of a photography shop in Newark for a cover.

Now, I would like to talk to you just for a few moments, on the radios that have come into this case. You will recall that Hayhanen said that the defendant used radios.

The defendant said that he was going away the end of April because his sinus bothered him and, accordingly, paid his rent to McMullen and left. Paid two months in advance, I might say, and that is the only time that they had an advance from him.

After that, McMullen didn't see him around, and some of his character witnesses didn't see him around either.

Summation for the Government.

However, there was an agent from the Federal Bureau of Investigation up in the top floor of (981) the Touraine Hotel who saw him, and there was another agent up here in the building who saw him.

The F. B. I.'s surveillance placed the defendant, strangely enough, in the studio over here on 252 Fulton Street on May 23, at 10:45 o'clock. He left at 11:50, and it is quite a coincidence that those periods in the studio coincide with the radio schedule found here in the pencil (indicating), the pencil that he threw into the wastebasket in the Hotel Latham, the same pencil that it is alleged that the defendant didn't throw away, is still his.

On June 13th, the F. B. I. agents placed the defendant in the studio at 252 Fulton Street, from a period of ten o'clock to 11:50.

I might say that it happens to coincide with the radio schedule, again, found in the pencil. (Indicating).

Now, I just would like to discuss, because Hayhanen has been made such an issue, some of the independent corroboration which we promised you—independent corroboration of Hayhanen's testimony.

I don't find the substance of his testimony (982) contradicted, disputed, or challenged. The cross examination was directed to the man's personal habits.

He wasn't questioned on a drop.

He wasn't questioned on a conversation with the defendant.

He wasn't questioned on any of his assignments. And that, to me, is very important.

Now, who was he corroborated by? These are the other Government witnesses: Thirteen F. B. I. agents who did a magnificent job in a very difficult case.

Thirteen of them. You saw them, and you saw their demeanor on the stand, and you are able to evaluate their testimony, carefully secured, careful, painstaking work of a great organization.

Summation for the Government.

Corroboration by an agent of the Immigration & Naturalization Service. Corroboration, ladies and gentlemen, by thirteen plain American citizens with no interest except that justice be done.

Now, let's talk about that corroboration. I think his testimony is corroborated by the use of the Maki birth certificate and the passport.

He testified that there was a signal area, you (983) will recall, in Brand's Bar, the signal area used by Hayhanen and Asko. He told the F. B. I. about the signal area in Brand's Bar, and the F. B. I. went to Brand's Bar and what did they find?

They found a message, a message which Hayhanen identified as being in Asko's handwriting.

The Prospect Park drop I have already covered—strong corroboration of Hayhanen.

Hayhanen was corroborated very strongly in connection with the defendant's visit to Moscow.

He was strongly corroborated by the handwriting expert. He said that he had received Exhibits 28 and 29, the matrices and the microdot documents—he had received them from the defendant.

(984) The typewriting expert said they were typed on the defendant's own typewriter.

The bank book corroborates the Moscow trip.

I think another strong item of corroboration, completely divorced from Hayhanen was the \$3,000, the reference to the \$3,000 in the nickel message and then, of course, you recall that the witness Hayhanen said he had gotten some spectroscopic film from the defendant, and I think it was clearly shown to you and brought out on cross examination by counsel for the defendant, very strongly, the availability of this type of film.

It wasn't developed by the Government. On cross, you heard the Eastman Kodak witness state that all types of spectroscopic film, that there hadn't been any other sale, in the last five years, and who was that sale made to; strangely enough, E. R. Goldfus. Very strange.

Summation for the Government.

The same E. R. Goldfus concerning whom there was some doubt because one document had two S's and the other one had one S. Both documents had the same mother, the same father, the same country of origin for the parents and the same address.

(985) Is there any doubt in your minds about E. R. Goldfus?

And lastly, again, I refer to Hayhanen's testimony, that the Prospect Park drop was sealed. The F. B. I. agents went to the Prospect Park drop and found it that way and found in it a message written on Defendant's typewriter.

Now, what about items that Hayhanen didn't know anything about, could have absolutely no connection, that could inculcate this defendant. Look at them. These are out of the storeroom over at 252 Fulton Street: a bolt, cuff link, hollow cuff link, and Hayhanen never saw this, never knew of its existence. This was in the defendant's storeroom: tie clasp, hollowed-out tie clasp over at the defendant's storeroom: Another bolt, hollowed-out battery, not the type used by the Boy Scouts, a hollowed-out battery. I doubt if that is readily available and some more tie clasps and I think it is safe to say, there isn't a man on this jury who ever saw a tie clasp like that.

I am sure that no woman has ever bought one for her husband, not that kind that comes open.

Now, these items have been referred to as toys. (986) as were the coins. Toys.

I don't believe anybody would call these toys for amusement. They are not toys for amusement.

Ladies and gentlemen, they are tools for destruction, destruction of our country; that is the purpose of this conspiracy. These toys, tools for destruction, believe me.

Now, let's talk a little bit about the conduct of the defendant. There isn't anybody that I know who knew him as Rudolph Abel. He was known as Goldfus, known as Mark, and he was known as Martin Collins and the tenants, not one of his character witnesses, knew him as Rudolph Abel.

Summation for the Government.

I think his conduct has been, it can best be described as secret, as conduct intended to deceive, conduct showing the cunning of a professional, a highly-trained espionage agent, conduct of a master spy, a real pro.

Now, just remember this, this was this man's chosen career. He knows the rules of this game, and so do his family, so does his mature daughter. He is entitled to no sympathy.

Now, I would like to talk a minute also about the items that have been found, to reiterate (987) to you the items that were found without Hayhanen, of course, without Rhodes, who have been labeled the two chief accusers.

The typewriter, birth certificates and I have already mentioned the tie clasp and the cuff links. How about the hollow pencil? This pencil was thrown in the waste paper basket in the Latham Hotel. How about the code book, concealed in a sanding block which you saw yesterday? Reino Hayhanen didn't slip that into the defendant's possession, believe me.

Again, the nickel message in the Prospect Park drop and the radio schedule. How about the defendant's own admissions down in McAllen, Texas? Admissions that he was a citizen of the U. S. S. R.

Of course, on letters, bank statements or on his bank application he said he was an American, but out of his own mouth comes the admission, no, he is a citizen of the U. S. S. R. He hasn't informed the United States Attorney General of his address, that he is in this country illegally and that he has concealed his identity.

What could be more cogent?

(988) Now, let's get back to the evidence.

The end of April of this year, he told Harry McMullen that he is going away for his sinus trouble. He also told Levine, one of his character witnesses, that he was going away.

For the first time the defendant, as I said before, paid two months' rent in advance to McMullen, \$70.

Summation for the Government.

Now, let's find out where he went on vacation for that sinus trouble. Where did he go?

He went across the river to the Broadway Central Hotel.

I don't know what Manhattan has got for treatment of sinus conditions that Brooklyn doesn't have, but that is where he went, to the Broadway Central Hotel.

And for the first time, ladies and gentlemen, the identity of Martin Collins is revealed, the first time that he uses the name Martin Collins.

Now, you might, in considering this testimony, think that about this time, or consider that about this time Hayhanen had left ostensibly for Moscow; that about this time Hayhanen appeared to be possibly among the missing.

(989) Now, should there be any question on the identity of Martin Collins? I don't see how there could be; when he registered at the Broadway Central, he put on there, to notify Bert Silverman, 252 Fulton Street. He left the Broadway Central Hotel and where did he go? He went to Daytona Beach, Florida, where he again registered as Martin Collins.

Then, upon leaving Daytona Beach he registered in on May 18th at the Latham as Martin Collins.

You will recall that he stayed there until June 21st and you will also recall that during this very shaky period for him, I am sure, he procured a international certificate of vaccination.

You will then recall that he was never seen back at the studio by any of his character witnesses. He was never seen by the building superintendent who is around there. The only people who saw him, and he was identified by Agent McDonald as the man who went down in the elevator with him in May.

The only people who saw this man were the vigilant F. B. I. agents who were surveilling the studio and when did they see him? As I have already said, they saw him on evenings and at times that coincide completely with the radio schedule (990) that was in the pencil that he threw in the waste paper basket at the Latham.

Summation for the Government.

Now, it is hot and I am sure that this jury in their very wise judgment and with the use of their very good common sense can readily arrive at a result.

I can simply say this to you: Never in my experience have I seen the definite stating and overwhelming corroboration that has been presented to you in this case.

We said we would give you—we promised we would give direct evidence, and we did.

We said there would be circumstantial evidence, and you got it.

We said there would be documentary evidence, and we produced it, and we said that we would prove through admissions of the defendant that he was guilty of the offense charged by the grand jury.

I simply say this, this is a serious case. This is a serious offense. This is an offense directed at our very existence and through us at the free world and civilization itself, particularly in light of the times.

And I say this, and I don't believe I have ever (991) said anything more heartily or more seriously: I am convinced that the Government has proven its case not only beyond a reasonable doubt as required, but beyond all possible doubt.

I am convinced that you people in your wisdom and judgment will be able to evaluate the truth of the statements of the various witnesses that the Government has presented.

I am sure that you will be able to evaluate the facts in this case as result to the crime of conspiracy and with the direction, the charge by the Judge, you will arrive at a correct result. I can't stress too much, too strongly, that you don't have to succeed to be guilty. You don't have to succeed.

I think that society and the Government is entitled to protect itself when they find people conspiring to commit an offense.

We are not helpless. We don't have to, as I said, wait until the corpse is on the ground before we can move in.

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We can move in as soon as the crime has been accomplished and that is the partnership, the agreement, confederation, plus the commission of one overt act.

(992) Now, again, in closing I just want to say this to you, again we are appreciative of your courtesy, for the attention that you have paid to this very important case. I am absolutely convinced, it is my very strong conviction, that after you have deliberated and considered everything, that you will find this defendant guilty, guilty as charged by the grand jury, guilty, I am convinced, by the overwhelming weight of evidence, by the overwhelming corroboration, that the Government has presented to you.

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(994) The Court: Will counsel please step up here?

(Side-bar discussion.)

(Out of the hearing of the jury:)

The Court: Out of the hearing of the jury Mr. Donovan was asked if he wished the Court to state to the jury that the failure of the defendant to take the stand in no wise can be used against the defendant.

Mr. Donovan states that he prefers that no reference whatever to the subject be made.

Mr. Donovan: This is agreeable to the Government?

Mr. Tompkins: Oh, certainly.

(The following took place within the hearing of the jury:)

(995) The Court: Members of the jury, the time has now come for you to take over your deliberations in this case, and doubtless you feel that you know a great deal about it and perhaps you prefer not to have to listen to anything from the Court on the subject.

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If that is your point of view, it is also mine, but we cannot yield to our preferences. It is my duty to give a charge and it is your duty to listen to it.

You realize that underlying this case there are three provisions of the law concerning which you should be advised, because the indictment contains the charge of three different conspiracies

Those alleged conspiracies have to do with substantive provisions of the law, so that as long as you may clearly understand the subject, I must refer to those substantive provisions of the law with the warning that there is no charge against this defendant that he has violated any substantive law.

The first involved is found in Title 18, United States Code, Section 793, and provides in part, and I shall read:

(996) "Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States", is guilty of an offense.

Part of that statute says:

"Whoever for the purpose aforesaid receives or obtains or agrees or attempts to receive or obtain from any person or from any source whatever any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance or note, of anything connected with the national defense, knowing or having reason to believe at the time he receives or obtains or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made or disposed of by any person contrary to the provisions of this chapter."

That has to do with the first count which alleges a conspiracy to violate that law, that is to say, transmit such intelligence as the law describes.

The second count has to do with obtaining the information.

(997) I am reading from Section, the same title, 794, Subdivision (a):

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"Whoever with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation communicates, delivers or transmits or attempts to communicate, deliver or transmit to any foreign government such articles,"—as I have heretofore read to you as described in the statute—"shall be guilty of an offense."

The same section provides that, "If two or more persons conspire to violate this section and one or more of such persons do any act to affect the object of the conspiracy, each of the parties shall be subject to the punishment provided in the law."

Now, it strikes me and perhaps counsel will correct me, is it the fact that it is the violation of 794 which constitutes the first count, the conspiracy to violate Section 794?

Mr. Maroney: That is correct, sir.

The Court: And it is the conspiracy to violate Section 793 constitutes the second count?

Mr. Maroney: Yes, sir.

The Court: Let me amend my statement in that (998) respect.

Now, the third statute involved is found in the same title, Section 951.

"Whoever other than a diplomatic or consular officer or attache acts in the United States as an agent of a foreign government without prior notification to the Secretary of State shall be punished as the law provides."

Again, I say it isn't a substantive offense which is alleged. It is a conspiracy to violate each of these provisions of the law which is charged in this indictment.

Now, in this connection, the defendant has requested certain specific charges to the jury and as to request number fourteen I propose to grant it to the extent that I shall read it:

"The elements of the substantive offense which the defendant is charged with conspiring to commit in Count One of the indictment are as follows:

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"1. The transmission;

"2. To the U. S. S. R. of;

"3. Information relating to the national defense of the United States of America;

"4. With intent and reason to believe that (999) the said information would be used to the advantage of the U. S. S. R.," and I so charge.

As to the second count, the request is:

"The elements of the substantive offense which the defendant is charged with conspiring to commit in Count Two of the indictment are as follows:

"1. The receiving and obtaining;

"2. Of documents connected with the national defense of the United States;

"3. For the purpose of obtaining information respecting the national defense of the United States;

"4. With the knowledge that said documents would be transmitted to the U. S. S. R., and

"5. Intending such documents would be used to the advantage of the U. S. S. R.," and I so charge.

With regard to the third count; that is defendant's request number fifteen that I have just read; this is request number sixteen:

"The elements of the substantive offense which the defendant is charged with conspiring to commit in Count Three of the indictment is as follows:

"1. The acting as agent of the Government of the U. S. S. R. within the United States;

(1000) "2. Without prior notification to the Secretary of State;

"3. Of persons who were not included among the accredited diplomatic, consular or attaches of the Govern-

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ment of the U. S. S. R.," and I so charge that request, No. 16.

Now, you understand, or at least, I hope you do, it has been repeated to you a great many times, that the substance of this indictment is a conspiracy to violate those provisions of the law.

The indictment is not evidence of anything.

The indictment is a charge and it is not to be regarded as a self-proving charge. The fact that the charge has been made is the reason that the case is in court. Beyond that, the indictment has no potency.

Now, the indictment charges, as I have heretofore said, three conspiracies; and while I am not going to burden you with the document in its entirety, I shall endeavor to point out the salient aspects of it.

As to Count One, that from in or about 1948 and continuously thereafter up to and including the date of the filing of this indictment, which I (1001) think was August of 1957, Rudolf Ivanovitch Abel, also known as Mark and also known as Martin Collins and Emil R. Goldfus, the defendant, unlawfully, wilfully and knowingly did conspire and agree with Reino Hayhanen, also known as Vik, Mikhail Svirin; Vitali G. Pavlov, and Aleksander Mikhailovich Korotkov, co-conspirators but not defendants herein, and with divers other persons to the Grand Jury unknown, to violate Sub-section A of Section 794, Title 18, United States Code,—I read part of that to you—in that they did unlawfully, wilfully, and knowingly conspire and agree to communicate, deliver and transmit to a foreign government, to the U. S. S. R., and representatives and agents thereof, directly and indirectly, documents, writings, photographs, photographic negatives, plans, maps, models, notes, instruments, appliances, and information relating to the national defense of the United States of America, and particularly information relating to arms, equipment and disposition of the United States Armed Forces, and information relating to the atomic energy program of the United States, with

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intent and reason to believe that the said documents, writings, and so forth, and (1002) information would be used to the advantage of a foreign nation, the U. S. S. R.

That is the general charge of that conspiracy.

Now, in order to set forth the conspiracy completely, the indictment continues to describe it somewhat in detail.

It says that it was part of the conspiracy that the defendant and his co-conspirators would collect and obtain, and attempt to collect and obtain and would aid and induce divers other persons to the Grand Jury unknown, to collect and obtain information relating to the national defense of the United States of America, with intent and reason to believe that the said information would be used to the advantage of the said foreign nation, the U. S. S. R.

(1003) Further, it was part of the conspiracy that the U. S. S. R. and certain of the co-conspirators, including Korotkov and Svirin, being representatives, agents and employees of the government of the U. S. S. R., would by personal contact, communications and other means to the grand jury unknown, both directly and indirectly, employ, supervise, pay and maintain the defendant and other co-conspirators for the purpose of communicating, delivering and transmitting information relating to the national defense of the United States to the said U. S. S. R.

Further, that the defendant and certain of his co-conspirators would activate and attempt to activate, as agents within the United States, certain members of the United States Armed Forces, who were in a position to acquire information relating to the national defense of the United States and would communicate, deliver and transmit, and would aid and induce each other and divers other persons to the grand jury unknown, to communicate, deliver and transmit information relating to the national defense of the United States to the U. S. S. R.

Further, that the defendant and certain of his (1004) co-conspirators would use short wave radios to receive instructions issued by said government of the U. S. S. R.

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and to send information to the said government of the U. S. S. R.

Further, that the defendant and certain of his co-conspirators would fashion containers from bolts, nails, coins, batteries, pencils, cuff links, and the like, by hollowing out concealed chambers in such devices suitable to secrete therein microfilm, microdots and other secret messages.

Further, that the defendant and his co-conspirators would communicate with each other by enclosing messages in said containers and depositing said containers in pre-arranged drop points in Prospect Park in Brooklyn, New York, in Fort Tryon Park in New York City, and other places within the jurisdiction of this Court.

Further, as part of the conspiracy, the defendant and certain of his co-conspirators would receive from the U. S. S. R. and its agents, large sums of money with which to carry on their illegal activities within the United States, some of which money would be stored for future use by burying it in the ground in certain places in the Eastern (1005) District of New York and elsewhere.

Further, that the defendant and certain of his other co-conspirators, including Hayhanen, would assume on instructions of the government of the U. S. S. R. the identities of certain United States citizens, both living and deceased, and would use birth certificates and passports in the names of such United States citizens, and would communicate with each other and other agents, officers and employees of the U. S. S. R. through the use of numerical and other types of secret codes and would adopt other means to conceal the existence and purpose of the conspiracy.

Further, that the defendant and certain of his co-conspirators would in the event of war between the United States and the U. S. S. R. set up clandestine radio transmitting and receiving posts for the purpose of continuing to furnish the Government of the U. S. S. R. with information relating to the national defense of the United States

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and would engage in activities of sabotage against the United States.

What I have read you thus far is a kind of a description of the nature and avowed objects of the (1006) conspiracy.

As I shall explain to you in a few moments, a conspiracy in order to be punishable, involves an agreement, and secondly a doing of one or more things by one or more of the conspirators for the purpose of carrying the agreement into effect.

In an indictment, the things that are said to have been done to carry the agreement into effect are called overt acts and this indictment recites certain overt acts as follows:

1. In or about the year 1948 Rudolph Ivanovitch Abel, also known as Mark and also known as Emil R. Goldfus and Martin Collins, the defendant herein, did enter the United States at an unknown point along the Canadian-United States border.

2. In or about the summer of 1952 at the headquarters of the committee of information (known as the K. I.) in Moscow, Union of U. S. S. R., Reino Hayhanen, also known as Vic, a co-conspirator herein, did meet with Vitali G. Pavlov, a co-conspirator herein.

3. In or about the summer of 1952 at the headquarters of the committee of information (known as the K. I.) in Moscow, Union of Soviet Socialist (1007) Republics, Reino Hayhanen, also known as Vic, a co-conspirator herein, did meet with Mikhail Svirin, a co-conspirator herein.

4. On or about October 21, 1952, in New York City, Reino Hayhanen did disembark from the liner *Queen Mary*.

5. October, 1952, Hayhanen did go to Central Park in Manhattan and leave a signal in the vicinity of the restaurant known as the Tavern on the Green.

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6. In the year 1952 Hayhanen did go to the vicinity of Prospect Park in Brooklyn within the Eastern District of New York.
7. In November, 1952, Hayhanen did go to Fort Tryon Park in New York City and did leave a message.
8. December, 1952, Hayhanen did meet and confer with Svirin in the vicinity of Prospect Park in Brooklyn.
9. In the summer of 1953, Svirin did meet and confer with Hayhanen in the vicinity of Prospect Park within this District and did give to Hayhanen a package of soft film.
10. On or about December 17, 1953, this defendant did rent a studio consisting of one room (1008) at 252 Fulton Street.
11. In or about August or September, 1954, the defendant did meet with Hayhanen in the vicinity of the Keith's RKO Theatre, Flushing, Long Island, within the Eastern District of New York.
12. In the summer of 1954 the defendant and Hayhanen did go by automobile to the vicinity of New Hyde Park, Long Island.
13. That in or about March or April, 1955, the defendant and Hayhanen did proceed by automobile from New York City to Atlantic City, New Jersey.
14. In the spring of 1955 Hayhanen did proceed by automobile from New York City to the vicinity of Quincy, Massachusetts, at the direction of the defendant Abel.
15. In or about December, '54 or January of '55 Hayhanen did proceed by rail transportation from New York to Salida, Colorado, at the direction of the defendant Abel.
16. In or about the spring of '55, the defendant Abel and Hayhanen did proceed from New York City to the

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vicinity of Poughkeepsie for the purpose of locating a suitable site for a short wave radio.

17. In or about the spring of 1955, the (1009) defendant Abel did give a short wave radio to Hayhanen. This was in the vicinity of 252 Fulton Street, Brooklyn.

18. That in or about 1955 the defendant Abel did bring a coded message to Hayhanen and did request him to decipher said message.

19. That in February of 1957, the defendant and Hayhanen met and conferred in the vicinity of Prospect Park, Brooklyn; and the defendant did then and there give to Hayhanen a birth certificate and \$200 in United States currency.

Those are the overt acts alleged in connection with Count One and the same overt acts are alleged in connection with Count Two and I should say with reference to Count Two, the general outlines of the conspiracy are the same.

(1010) You will understand that Count Two deals with procuring information; Count One deals with transmitting it, but in all other respects they resemble each other and so the general language of description need not be repeated nor need the overt acts.

Now, turning to Count Three, which has to do with the failure to register as a foreign agent, the conspiracy is described as follows:

"Throughout the entire period from 1948 to the filing of the indictment the Government of the U. S. S. R., through its representatives, agents, and employees, maintained within the United States a system and organization for the purpose of obtaining, collecting, and receiving information and material from the United States of a military, commercial, industrial, and political nature, and in connection therewith, recruited, induced, engaged, and maintained the defendant and co-conspirators and other persons as agents, representatives, and employees to obtain, collect, and receive such information for the U. S. S. R.

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"2. That in or about 1948 and continuously thereafter up to the filing of the indictment, this defendant unlawfully, wilfully and knowingly did conspire and agree with the Government of the U. S. S. R. (1011) and with the agents, officers, and employees thereof, including Korotkov, Pavlov and Hayhanen, co-conspirators but not defendants, and with divers other persons to commit an offense against the United States, namely, to violate Section 951, Title 18, United States Code," and I read that to you a little while ago.

"3. It was part of the conspiracy that the defendant and Hayhanen and other conspirators, none of whom were included among the accredited diplomatic or consular officers or attaches of the U. S. S. R. or of any foreign government, would, within the United States and without prior notification to the Secretary of State, act as agents of the said government of the U. S. S. R. and as such obtain, collect and receive information and material of a military, industrial, and political nature and communicate and deliver such information to other co-conspirators for transmission to the U. S. S. R. It was part of the conspiracy that the conspirators residing outside the United States would direct, aid, and assist the defendant in such and certain co-conspirators to act as such agents within the United States, and would receive and transmit the (1012) said information and material to the U. S. S. R.

"4. It was further part of the conspiracy that the Government of the U. S. S. R. and its officers, agents and employees would employ, supervise, and maintain the defendant and Hayhanen within the United States as such agents for the purpose of obtaining, collecting, receiving, transmitting and communicating information and material of a military, commercial, industrial, and political nature.

"5. It was further part of the conspiracy that the defendant and certain of his co-conspirators would receive sums of money and other valuable considerations from the

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Government of the U. S. S. R., its officers, agents and employees in return for acting as such agents within the United States for the purpose of obtaining, collecting, and receiving, transmitting and communicating information, material, messages, and instructions on behalf and for the use and advantage of the U.S. S. R.

"6. It was further part of the conspiracy that said defendant and his co-conspirators would use false and fictitious names, coded communications, and would resort to other means to the Grand Jury unknown to conceal the existence and purpose of the (1013) conspiracy."

And the overt acts as alleged in connection with Count Three are the same as those which I have read to you with reference to Count One and referred to with reference to Count Two.

Now, it is necessary to explain and discuss somewhat in detail the difference between a conspiracy to commit a substantive crime and the substantive crime itself.

A conspiracy is said to have its origin in the minds of those who become parties to the conspiracy, to become the conspirators. A conspiracy thus is essentially an agreement but that doesn't mean that it is a formal kind of an agreement such as you will find in the ordinary business transaction. I have never known of a conspiracy to involve a written agreement.

Perhaps I ought to interpose that in conspiracies under the Sherman Law, with which we are not concerned, I suppose written agreements are offered in evidence. But that isn't this kind of a case. An agreement is not written, it is not formal, and it almost never is entered in the light of day. If people are forming a conspiracy to violate the (1014) law, they don't meet on the public street and hold up a sign and tell the passers-by that the purpose of their meeting is to form a conspiracy. Necessarily it is a secret and a clandestine thing.

Now, since that is its nature, about the only way that you can prove the existence of a conspiracy is to prove the

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conduct of those to whom you impute the conspiracy. As you know, we haven't yet devised any instrument that will enable us to peer into the workings of the human mind. The only way that we can determine what goes on within the mind is to observe the conduct and, sometimes, the word of the given individual who is under examination. So that, in order to ascertain whether a conspiracy exists as the result of a common purpose or an agreement, we examine into the conduct of those who act together and who are thought to act together by reason of the agreement that they have entered into between themselves.

The mere agreement does not impose criminal responsibility for the reason that people might conspire to violate the law but then they might be discouraged. They might change their minds; they might abandon their original plan. So that the (1015) law, in order to punish a conspiracy, requires proof not only of the existence of the conspiracy but the doing of one or more things by one or more of the conspirators to carry the plan or purpose into operation.

So that those are the necessary elements of proof that the jury will have to consider in any conspiracy case and, of course, in this conspiracy case.

I should say in this connection that the doing of one or more things to carry the plan into operation is that branch of the case which is comprehended in the overt acts. The overt acts are the things which are alleged as the steps taken to carry the common purpose into effect.

It is not necessary that every one of the overt acts be proven. At least one and perhaps more, as alleged, must be proven or an overt act consistent therewith but not the entire scheme, not the entire list of overt acts need necessarily be proven.

Now, there is another thing that should be explained in connection with this particular kind of criminal offense. The offense is complete upon the demonstration by the required measure of proof, (1016) which I shall explain,

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of the agreement, the parties to it, and the doing of one or more things to carry the agreement into effect.

That constitutes the crime. The conspiracy may fail in its purpose and yet the offense which the law denounces is established once these requirements that I have just referred to have been demonstrated.

Let me illustrate what I have in mind by a simple example which has no reference to the testimony in this case.

Suppose, if you like, that three men decide that they will blow up this Federal Building for a reason good to themselves; the building ought to be removed and all of its occupants, is their opinion. They discuss the matter among themselves, and one of them says, "Yes, I will try to obtain three sticks of dynamite. I know where I can get them."

And the second says, "I will try to obtain a steel drill to bore a hole in some of the supporting beams. I know where I can buy one."

And the third one says, "I will try to obtain an electric battery to detonate the dynamite. I know where I can get one. We will agree that this plan (1017) can be perfected in, say, forty-eight hours."

So the first man goes out and tries to get the dynamite; the second man goes out and tries to get a drill; and the third man goes out and tries to get an electric battery.

Now, it may well be that the forces of law intervene so that their plans are frustrated; it may well be that the efforts to procure the dynamite failed because that which he procured proves to be water-soaked. The efforts to procure the steel drill may fail because the man in trying to get it falls down and breaks a leg; and the man who tries to get the electric battery hurts himself while he is trying to make the battery work, so that the plan comes to nothing.

But the original agreement having been shown and each man having undertaken to do a specific thing to carry the plan into effect, and the evidence showing that he has tried each to do his part, the offense under the law is made out

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and the fact that it comes to nothing has no bearing whatever upon the question of whether the crime has been committed.

The crime was complete when the agreement was (1018) made and when one or more things were undertaken to carry that plan into effect.

I hope I have made the law reasonably clear on that subject.

Now, of course, the conspiracy that the evidence demonstrates must be the conspiracy charged in the indictment, not some other conspiracy. It must be the conspiracy charged in the indictment, and the evidence must reveal the conspirators, the purpose, the objects that they entertain, and one or more of the overt acts as alleged in the indictment.

Now, we move to the next step, which is the presumption of innocence which attaches to this defendant and to any other defendant in a criminal case. It pertains to him from the outset of the case until the jury shall return with its verdict.

In order to overcome that presumption, the burden of proof rests upon the Government to prove guilt beyond a reasonable doubt as to every essential element of the crime as charged in the indictment.

What does a reasonable doubt mean?

Well, just as the words indicate. It means a doubt which is present in your minds as the result of the exercise of your reasoning faculties as you apply (1019) those faculties to every element of the testimony in the case.

The emphasis is upon your reasoning faculties and that necessarily excludes your emotions. You know that two of our favorite emotions are sympathy and prejudice. You may not rely upon either of those or any other emotion and call the result the creation of a reasonable doubt.

The emotions, as you know, and this is true of every one of us, sometimes fly in the face of our reasoning processes, and that is why it seems necessary to warn you particularly

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against the exercise of emotion, prejudice, sympathy; and, by reason of the nature of this case, I am going to venture to say something which I hope and believe is entirely unnecessary.

Do not for the slightest instant of time as you go over the evidence in this case allow yourselves to dwell upon the reflection of what might happen if the conditions were reversed; namely, if an American citizen unlawfully within the U. S. S. R. were to be charged before a tribunal of that country with the equivalent of what this defendant is charged with in this case.

(1020) In the first place, you don't know what would happen, and, therefore, it is an entirely idle speculation; and, in the second place, no matter what that speculation might lead you to conclude, it would be of no value whatever to you in the performance of your duties.

(1021) We are concerned, you and the Court, with the enforcement of our standards of law. We are not interested in the standards which prevail in any other part of the world. We are responsible only for the way in which we discharge our duties as American citizens. I presume that that covers the situation.

I will observe, however, that while the defendant is a visible person in this courtroom, there is also an invisible presence at this trial; namely, our spirit of fair play, our spirit of administering justice according to our own standards which are in the keeping of the Court, the jury, and counsel.

Now, turning somewhat to the testimony. In the first place, you are relieved of the ordinary task of a criminal jury in choosing between conflicting versions of a given alleged occurrence. You are confronted with no conflict in testimony whatever.

That does not mean that you must not examine the testimony, even though it be uncontested, with the greatest of care. The contrary is the fact.

Now, with reference to the conspiracy itself; (1022) namely, its membership, its purpose, its aims and

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objects, you have the testimony of Hayhanen. That is the only testimony in the case on that subject.

Now, of course, he is an accomplice by his own recital. He is one of the conspirators. Now, the testimony of an accomplice is entirely admissible in the administration of our system of law, but in weighing what such a person says you are required to apply to it the most careful and exacting scrutiny, considering what personal object or benefit an accomplice may have in giving his testimony at all, and how far you can believe what he says in view of the fact that he is an accomplice.

As to every witness who has testified before you, if you find that he has testified falsely with respect to a material issue in the case, you have the right to disregard his entire testimony because of the false element. Equally, you have the right to accept that which you find to be credible and reject that which you do not find to be credible. That is entirely and exclusively a question for the jury to determine for itself.

In examining Hayhanen's testimony and in (1023) deciding whether you will accept it in whole or in part, you will naturally turn to the other testimony in the case which has been offered on the theory that it tends to corroborate that which he has stated on the witness stand.

Certainly such essential matters as the drops, the containers, the use of code and other elements in the case which were the subject of the testimony of the various F. B. I. witnesses are probably sufficiently present in your minds for me not to bore you by trying to recall them.

I will state at this time that if my total is correct, you have listened to the testimony of thirty-one witnesses:

Schoenenberger, Farley, Kanzler attached to the United States Immigration and Naturalization Service; Blasco, F. B. I.; Noto, Departmental Assistant to the Special Investigator of the Immigration and Naturalization Service; Hayhanen; Mrs. Brown, Rhodes' sister; Gamber, F. B. I.; Mulhern, F. B. I.; Tulai, F. B. I.; Webb, F. B. I.; Steel,

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F. B. I.; Tribelhorn, concerning the lease to Goldfus; Silverman concerning the typewriter which he said the defendant put in his (1024) keeping; Clark of the Eastman Kodak Film Distributing Service; McMullen with reference to the premises 252 Fulton Street; Bozart who found a coin; Milley, to whom Bozart reported the find, and O'Connor on the same subject; Leonard, Special Agent of the F. B. I. with reference to the code; Miller, Special Agent of the F. B. I.; Dr. Groopman, M. D., with reference to Collins and the International Vaccination Certificate; Putnam, Special Agent of the F. B. I.; Anderson, the Department of State on the subject of there being no registration; Sergeant Rhodes—I will comment on him in a moment; Heiner, Special Agent of the F. B. I.; McDonald, Carlson, Sowick, Wilson; Usher from the New York City Department of Health, Vital Statistics; Kehoe, F. B. I.; Levine, a friend of the defendant, or, at least, a colleague of his in the occupancy of storage space in 252 Fulton Street.

I think that is the list of witnesses. It may be incomplete. Either counsel will feel free to correct me.

Mr. Tompkins: Your Honor, you mentioned (1025) four witnesses: Blasco, Noto, Kanzler and Farley. They did not testify before this jury, sir.

The Court: They were in the hearing?

Mr. Tompkins: They were in the hearing, sir.

The Court: The mistake is due to the fact there was a hearing out of the presence of the jury on other subjects. I am withdrawing those names.

I said I would comment on the witness Rhodes. The only purpose in that connection is this. There was a motion made to strike his entire testimony, largely based, although not at the time the motion was made but thereafter, on Rhodes' testimony that he never knew either the defendant or Hayhanen. That motion was denied, and the reason for the denial was this:

Rhodes testified concerning his career in Moscow. Hayhanen testified that, at the direction of the defendant, he, Hayhanen, had tried to locate Rhodes and that in that

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effort he had gone to Colorado, and I think his testimony was that the defendant paid his expenses; that having reached Colorado he telephoned to what was thought to be the residence of Rhodes; and I think that Mrs. Brown, Rhodes' sister, testified that at some time (1026) in the spring of 1955 she received a telephone inquiry from a person who spoke with a foreign accent.

Now, the purpose of retaining that testimony was to enable you to reach a conclusion as to whether in that respect Hayhanen had been corroborated and, perhaps, to enable you to form an opinion as to whether Rhodes struck you as being the kind of a person that an unfriendly power would seek out in the effort to employ him as an agent for that power. That is the reason the testimony was received and retained in the record; and I may still say that I think it was a correct ruling.

In denying that motion and, indeed, in deciding all other motions and ruling upon objections, the Court did not intend to convey or express an opinion as to the guilt or innocence of the defendant. Those rulings were rulings upon questions of law, and if the jury thinks it has observed an opinion on the part of the Court I urge you very strongly to disregard it because the question is solely for your determination.

I think I have touched on the subject of circumstantial evidence in connection with the existence or the creation, at least, and the functioning of the alleged conspiracy. I told you that it is impossible to look into the minds of anybody. You have to rely upon their conduct and their expressions. That is the circumstantial evidential aspect of a conspiracy case.

Now, circumstantial evidence may be relied upon but it must point inevitably to guilt in order to be relied upon. If it is consistent in any perceptible degree with innocence, then it may not and cannot legally sustain a verdict of guilt.

Something has been said about character testimony. In the first place, that is a misnomer. The correct expression

Requests and Exception to Charge.

is reputation testimony, and the reason that the distinction is called to your attention is this. There is a very evident difference between reputation and character. Reputation is what people think about you; character is what you really are.

Now, two or three of the witnesses were asked, somewhat casually, if the defendant's reputation was good and they said it was. Reputation testimony is regarded as important. In that connection let me say to you that if you believe the testimony, then the burden of proof resting upon the (1028) Government may be somewhat added to. It may be made heavier than would be the case if such testimony were not in the record.

You know there are a number of exhibits—I think there is an even one hundred offered by the Government and four or five offered by the defendant. Among those exhibits offered by the defendant are what both sides have argued to you are letters passing between the defendant and a member of his family. You may have been impressed by that argument. I am not saying whether you should have been or not, but I am calling your attention to the fact there is no evidence in this record as to the identity of a person who wrote any one of those letters or the person to whom any letter was addressed. So much of the argument, I think, was purely speculative.

Now, your verdict will be unanimous: guilty or not guilty on Count One; guilty or not guilty on Count Two; guilty or not guilty on Count Three.

I think I have now covered the subject as required by law.

Are there exceptions to the charge?

Mr. Donovan: Your Honor, there would be (1029) several exceptions both to your charge and to your failure to charge, and I thought I would ask whether you would wish those to be stated in the presence of the jury or outside.

The Court: State them at the bench so the jury won't hear them.

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Now, do not confuse exceptions with failures to grant requests. I will pass on the requests when I have passed on the exceptions.

I am speaking of exceptions to the charge.

Mr. Donovan: Your Honor, we have concluded that we will not make any exceptions to what your Honor has charged the jury.

We would, however, have some exceptions with respect to what your Honor has not charged.

The Court: You mean with my dealing with the requests?

Mr. Donovan: Yes, your Honor.

The Court: I will take those up separately.

Mr. Donovan: Would you wish to take them up at this time?

The Court: Oh, surely. This is the time to do it.

(1030) I will ask you to come up when I want you.

I think with respect to defendant's request No. 1 it is covered by the general charge.

Do you except to my refusal to charge as to request No. 1?

Mr. Fraiman: No, your Honor.

The Court: I think No. 2 is repetitious.

Do you except to my failure to charge No. 2?

Mr. Fraiman: We do not, your Honor.

The Court: I think No. 3 is covered in the general charge.

Mr. Fraiman: We agree, your Honor.

The Court: I think No. 4 is repetitious, particularly in view of the word or two that we had at the bench this morning.

Mr. Donovan: No exception.

Mr. Fraiman: I believe you have charged No. 4.

The Court: I think No. 5 deals with circumstantial evidence.

Mr. Fraiman: I believe you covered that, your Honor.

The Court: Do you think that No. 6 has been covered or don't you?

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(1031) Mr. Fraiman: We do not, your Honor. We request additional—

The Court: All right, request No. 6 I shall grant:

"If the prosecution has failed to establish to a moral certainty"—I will strike out "to a moral certainty". I will say, "Beyond a reasonable doubt, any one element of any of the offenses with which the defendant is charged and which it is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any such element constituting the offense"—I will strike out all that follows down to the word "then".

"Then you must find the defendant not guilty. This applies to the jurors as a whole and to each individual juror."

As amended, the request is granted.

I think the question of reasonable doubt has been sufficiently discussed.

Mr. Fraiman: We have no exception to your failure to charge request No. 7.

We would like your Honor to charge request No. (1032) 8, though.

The Court: Request No. 8 is:

"If the evidence casts any doubt upon any material issue in this case"—I will insert the word "reasonable" before the word "doubt"—

"If the evidence casts any reasonable doubt upon any material issue in this case, such doubt must be resolved in favor of the defendant."

Mr. Fraiman: We have no exception to request No. 9, your Honor—your failure to charge request No. 9.

The Court: You wish me to charge No. 10?

Mr. Fraiman: If you would, if your Honor please.

The Court: Request No. 10 is:

"In determining the credibility and the weight to be given to the testimony of witnesses, the Government is to

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be considered as any other party and its witnesses like any other witnesses."

I so charge.

I think that No. 11 is covered by the general charge.

Mr. Fraiman: Your Honor, I wondered if you would charge with respect to the second paragraph of request No. 11.

(1033) The Court: I think that is rather a metaphysical paragraph. I think the subject has been covered, and I will deny request No. 11.

Mr. Fraiman: We respectfully except.

The Court: Do you except?

Mr. Fraiman: Yes, your Honor. Respectfully except.

The Court: I think No. 12 is covered by circumstantial evidence.

Mr. Fraiman: Yes, your Honor.

The Court: I think the same is true as to 13.

Mr. Fraiman: Yes, your Honor.

The Court: And I think I have already granted your 14, 15, and 16, except as to the final paragraph in each case.

Mr. Fraiman: Would your Honor charge that final paragraph?

The Court: No, I will not. I refuse it as to 14, 15 and 16.

Mr. Fraiman: May we respectfully except to that, your Honor?

The Court: And I think I know the case on which you base your request, and I still refuse.

(1034) Mr. Fraiman: Yes, sir.

The Court: I think No. 17 probably has been covered.

Mr. Fraiman: I believe so, your Honor.

The Court: I consider No. 18 sufficiently covered.

Do you except to my refusal to charge?

Mr. Fraiman: I wonder, your Honor, with respect to request Nos. 18 and 19, whether your Honor would recharge the jury in words which cover both of those requests?

The Court: I will not recharge the jury, my friend. I have done my job. I will pass on your requests.

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Mr. Fraiman: May we except to your refusal to charge request No. 18?

The Court: 18 is refused.

19 is refused as being entirely too abstract.

Mr. Fraiman: Would your Honor charge with respect to request No. 20?

The Court: Request No. 20 is rather involved in form, but I had rather read it than argue about it.

"In considering whether or not the defendant (1035) was a member of a conspiracy, you must do so without regard to and independently of the acts, statements, or declarations of others. That is to say, you must determine the issue as to the membership of the defendant in the conspiracy from the evidence as to his statements or declarations and his acts or conduct. That is to say, you must determine the issue as to membership of the defendant in a conspiracy from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, or his own connection with the actions and conduct of others.

"The defendant's connection with a conspiracy cannot be established by the acts or declarations of other co-conspirators in his absence. And the defendant cannot be bound by the acts or declarations of other co-conspirators until (a) the conspiracy has been established,"—that means until the evidence indicates that it has been established—

(1036) "(b) the defendant's participation in the conspiracy has been established,"—namely that the evidence indicates the defendant's participation in the conspiracy.

I think number twenty-one has been covered.

Mr. Fraiman: Yes, your Honor.

The Court: I think number twenty-two has been covered.

Mr. Fraiman: I wonder if your Honor would charge with respect to request number twenty-two the second paragraph?

The Court: I think it is self-contradictory. If you are right in saying that the Government has not shown that the

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Russian nationals who, according to Rhodes, persuaded him to sell them information, are connected in any way with the conspiracy, I don't see how I can charge, then, that their acts are not binding upon the defendant. I think that is a self-evident proposition, if they are not members of the conspiracy.

I think with regard to twenty-three, I have pretty well covered the scrutiny that should be applied to Hayhanen's testimony.

Mr. Fraiman: Yes, your Honor.

(1037) The Court: I think I have covered twenty-four. Number twenty-five, I think I have covered, but in case I haven't, I will state it:

"You may not consider any offer of evidence that was rejected by the Court. As to any question to which an objection was sustained, you may not conjecture as to what the answer would have been had an answer been given, nor are you to draw any adverse inference from the fact that an objection was made.

"In this connection, you may not consider any evidence which the Court has stricken from the record, despite the fact that you may have actually heard the evidence in the court room."

I will charge the first sentence of twenty-six:

"I charge you that any personal information which you or any one or more of you may have as to the facts not proved, cannot be considered as a basis of your verdict."

The rest of the request is denied. Simply repetitious. Now, twenty-seven:

"I charge you that each of you must be satisfied (1038) that the verdict rendered represents your own personal judgment and the verdict must express your conclusion based upon the evidence in the case. While it is the duty of each juror to confer with his fellows and to discuss the evidence with them, the verdict must represent the real judgment and conclusion of each member of the jury and no one

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of you may acquiesce in any verdict against your own individual judgment. Each of you has to arrive at his conclusion separately, and each juror having in view the oath he has taken and his duty and responsibility thereunder, should have his own mind convinced beyond a reasonable doubt on all the evidence before he can conscientiously consent to a verdict of guilt. Each of you must act on his own judgment of the evidence and upon his own conscience and no one of you may surrender his conviction of the guilt or innocence of the defendant or of his reasonable doubt of guilt merely to prevent a disagreement."

Mr. Fraiman: Would your Honor not charge our supplemental request number one?

The Court: I will charge so much of it as follows:

(1039) "In order to find the defendant guilty on Counts One and Two, you must find beyond a reasonable doubt that the information which he conspired to obtain and transmit was material relating to the national defense. And this means secret information, information not available to the public upon request."

So much I charge. The balance I deny.

Now, as to the Government's requests, are there matters which have not been covered in the general charge and which you wish to charge?

Mr. Maroney: No, sir. I think the general charge covers them.

The Court: Mr. Scott said I may have left you in doubt. I don't understand how it could be, but he said I did.

I told you that your verdict should be guilty or not guilty on Count One, guilty or not guilty on Count Two, guilty or not guilty on Count Three.

I tried to keep them separate. I hope I did so.

Is there any misunderstanding as to that?

(No response.)

The Court: This concludes the duties of the alternate jurors. You are excused with the thanks (1040) of the Court for your attendance.

Verdict.

The jury will now undertake its deliberations.

The Clerk: The alternate jurors retire, please.

Everybody keep their seats until the jury retires.

(Whereupon, the alternate jurors withdrew.)

(Whereupon the United States Marshals were sworn to attend the jury.)

(Whereupon at 12:15 o'clock P. M. the jury withdrew for deliberation.)

(1041) (The jury entered the court room at 4:50 P. M.)

The Clerk: Members of the jury, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: In the case of the United States of America against Rudolf I. Abel, how do you find the defendant, guilty or not guilty on Count One?

The Foreman: Guilty.

The Clerk: How do you find the defendant, Abel, guilty or not guilty on Count Two?

The Foreman: Guilty.

The Clerk: How do you find the defendant, Abel, guilty or not guilty on Count Three?

The Foreman: Guilty.

The Clerk: As the Court has received your verdict, you say you find the defendant guilty on each of the three counts, and so say you all?

(The jury indicated in the affirmative.)

Mr. Donovan: May I ask that the jury be individually polled, your Honor?

The Court: Yes.

The Clerk: Juror No. 1, how do you find the defendant as to each of the three counts of the (1042) indictment, guilty or not guilty?

Juror No. 1: Guilty on all three.

Verdict.

The Clerk: Juror No. 2, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 2: Guilty on all three.

The Clerk: Juror No. 3, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 3: Guilty on all three.

The Clerk: Juror No. 4, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 4: Guilty on all three.

The Clerk: Juror No. 5, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 5: Guilty on all three.

The Clerk: Juror No. 6, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 6: Guilty on all three.

The Clerk: Juror No. 7, how do you find the defendant as to each of the three counts of the (1043) indictment, guilty or not guilty?

Juror No. 7: Guilty on all three.

The Clerk: Juror No. 8, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 8: Guilty on all three.

The Clerk: Juror No. 9, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 9: Guilty on all three.

The Clerk: Juror No. 10, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 10: Guilty on all three.

Motion to Set Aside Verdict.

The Clerk: Juror No. 11, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 11: Guilty on all three.

The Clerk: Juror No. 12, how do you find the defendant as to each of the three counts of the indictment, guilty or not guilty?

Juror No. 12: Guilty on all three.

The Clerk: As the Court has received each and every one of your verdicts separately, you say you (1044) find the defendant guilty on all three counts, and so say you all.

(The jury indicated in the affirmative.)

The Court: The verdict is received, recorded and filed. Are there motions?

Mr. Donovan: Your Honor, may I request that a date be set for motions and for sentencing?

The Court: Well, the motions should be heard at this time. The sentencing, of course, will be at a future date.

Mr. Donovan: May I have a moment to consult?

The Court: Surely.

Yes, Mr. Donovan?

Mr. Donovan: I believe, your Honor, that except for the motions we have previously made, the only motion that we would make at this time would be to set aside the verdict as against the weight of the evidence.

The Court: And you so move?

Mr. Donovan: Yes, your Honor.

The Court: The motion is denied.

The defendant is remanded in custody for sentence on November 15th.

(1045) The jury is discharged with the thanks of the Court, for your good and careful attention that you have given to this case and while you may not be interested, I would like to say, that if I were a member of the jury I would have reached the same verdict.

Good night and good luck to you all.

Sentencing.

(1047) The Clerk of the Court: Rudolf I. Abel, for sentence.

Mr. Donovan: Ready, sir.

The Court: Is there something to be said before the imposition of sentence, either on the part of the defendant or the Government?

Mr. Donovan: Your Honor, I addressed a letter to your Honor yesterday which was delivered this morning, and I would appreciate it if I could read that letter into the record.

The Court: Surely.

Mr. Donovan: "My dear Judge Byers:

"On November 15, 1957 the defendant in this case will appear before the Court for sentencing. While I shall request the privilege of making a brief oral statement on behalf of the defendant at that time, this letter is addressed to the Court beforehand so that there may be adequate opportunity for the Court and the Government to consider the substance of the statements which I shall make at the time of sentence.

"The defendant has been convicted on all three counts of the indictment. Count No. 1 carries a penalty of 'death . . . imprisonment for any term (1048) of years or for life.' Count No. 2 carries a penalty of a fine of not more than \$10,000, or imprisonment for not more than ten years, or both. Count No. 3 carries a penalty of a fine of not more than \$10,000, imprisonment for not more than five years, or both.

"The following arguments are predicated upon the assumption that the defendant has been found guilty of these offenses in accordance with all provisions of law.

"First, it will be my contention that the interests of justice and the national interests of the United States dictate that the death penalty should not be considered. This is because:

Sentencing.

"(a) No evidence was introduced by the Government to show that the defendant actually gathered or transmitted any information pertaining to the national defense;

"(b) Normal justification of the death penalty is its possible effect as a deterrent; it is absurd to believe that the execution of this man would deter the Russian military;

"(c) The effect of imposing the death penalty upon a foreign national, for a peacetime conspir- (1049) acy to commit espionage, should be weighed by the Government with respect to the activities of our own citizens abroad;

"(d) To date the Government has not received from the defendant what it would regard as 'coöperation'; however, it of course remains possible that in the event of various contingencies this situation would be altered in the future, and accordingly it would appear to be in the national interest to keep the man available for a reasonable period of time;

"(e) It is possible that in the foreseeable future an American of equivalent rank will be captured by Soviet Russia or an ally;"—

The Court: You mean an ally of Russia?

Mr. Donovan: Yes, your Honor.

"(Continuing) —at such time an exchange of prisoners through diplomatic channels could be considered to be in the best national interest of the United States.

"With respect to an appropriate term of years, the following facts are submitted as pertinent because this problem is novel in American jurisprudence:

"(a) During the 1920s, when France was the (1050) strongest power on the European continent and hence a primary objective of Soviet espionage, the average sentence given by the French courts to Soviet agents convicted of actually acquiring defense information, was three years

Sentencing.

imprisonment." Citing "Soviet Espionage," Dallin, Yale University Press, 1955, Page 56;

"(b) The sole British statute applicable to a similar case, of peacetime espionage by an alien, is the Official Secrets Act first passed in 1889 with a maximum penalty of life imprisonment; repealed and reenacted in 1911 with a maximum penalty of seven years; increased to fourteen years in 1920.

"Before writing this letter I sought and obtained the opportunity to discuss the matter in Washington with various interested government departments and agencies, including the Department of Justice. This does not mean that any one of such parties necessarily concurs in the foregoing.

"Very truly yours.

"(sig) James B. Donovan."

To that, your Honor, I would only add that the defendant Abel is a man fifty-five years old. He has faithfully served his country. Whether that (1051) country is right or wrong, it is his country, and I ask only that the Court consider that we are legally at peace with that country.

I ask that the judgment of the Court be based on logic and justice tempered with mercy.

The Court: Does the defendant wish to be heard in his own behalf?

The Defendant Abel: No, I have nothing to say, your Honor.

The Court: Mr. Tompkins, has the Government anything to say?

Mr. Tompkins: If your Honor pleases, the imposition of sentence is, of course, wholly a matter within your Honor's discretion. However, it may be of some aid and assistance to the Court in reaching its determination to have the benefit of the Government's observations and comments as to some of the matters which the Court would normally take into consideration in imposing sentence.

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First, just a word or two about the defendant himself. He is not a novice in the field of espionage. By training and by profession, for a period of over thirty years, he has been an agent for espionage (1052) age. He entered this country, by his own admission, in 1948 by stealth, employing a fictitious name, a phony passport, and a cunning which his training as a Soviet intelligence officer had given him. For the next nine years, by his own admission, he concealed his presence in this country by hiding his true identity from all with whom he came in contact.

During his residence in the United States, he is known to have communicated directly and indirectly with Moscow, and to have received instructions and to have activated agents and built an espionage apparatus.

The extent of Abel's activities are well-known to the Court from the evidence presented at the trial, and I am not going to go into the evidence any further because your Honor is so familiar with it.

There are, of course, many approaches to sentencing:

The deterrent effect which the sentence will have on others, rehabilitation and retribution. The concepts of rehabilitation or retribution would appear to have little application to this case, and I certainly think it would be (1053) naive to assume that a substantial sentence would deter the Soviets from continuing their espionage operations directed at this country and at the free world. But it would certainly serve notice upon the men in the Soviet Union, in the Kremlin, and those who carry out their assignments, that the commission of espionage in the United States is a hazardous undertaking.

The crime of which the defendant was convicted is not of the usual variety coming before this Court. I might say that the crime which he stands convicted of is not the same crime that Mr. Donovan adverted to when he quoted Dallin and from the British Official Secrets Act of back in 1920 and back in 1911. Espionage in 1957, I think, is completely dif-

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ferent. The threat against civilization, the threat against this country and the whole free world is inherent in this crime. In other words, it is an offense against the whole American people rather than a few individuals. So the punishment should be commensurate with the magnitude of the offense.

The present dangers which this country faces from the country whose leaders tell us, "They will (1054) bury us," **must also be considered.** While no shooting war exists, as Mr. Donovan has pointed out, no shooting war exists with the Soviets, we are engaged in a cold war with that country, the outcome of which could well decide who would be victorious in a hot war. In such circumstances, this Government must deal drastically with agents of foreign powers who cross our borders by subterfuge for the purpose of seeking out our vital national secrets.

Now, in the light of all these factors and considerations, the Government has certainly no hesitation in recommending, and indeed, it seems to me, has a duty of requesting the imposition of a substantial and very strong sentence in this case.

The Court: If there is nothing more to be said by either side, sentence will now be imposed.

The question of the sentence in this case presents no particular problem concerning the defendant as an individual. The Court knows next to nothing about his personal life or his true character, nor about the motives that may have caused him to enter this country illegally in 1948 and here conduct himself ever since as an undercover agent of the U. S. S. R. for the purposes described in the testimony of his (1055) assistant and accomplice.

Lacking this insight into the man known as Abel, the evidence requires that he be dealt with as one who chose his career with knowledge of its hazards and the price that he would have to pay in the event of detection and conviction of the violation of the laws of the United States enacted

Sentencing.

by Congress for the protection of the American people and our way of life.

Thus the problem will be seen to present the single question of how the defendant should be dealt with so that the interests of the United States in the present, and in the foreseeable future, are to be best served, so far as those interests can be reasonably forecast.

Many considerations have been involved in that study. It would not be the part of wisdom to recite them in this record, but suffice it to say that in the measured judgment of this Court the following sentence, based upon the jury's verdict of guilty as to each count of the indictment, is believed to meet the test which has been stated.

Pursuant to the verdict of guilty as to Count 1, the defendant is committed to the custody of the (1056) Attorney General of the United States for imprisonment in a Federal institution to be selected by him, for the period of thirty years.

Pursuant to the same verdict as to Count 2, the defendant is committed to the custody of the Attorney General of the United States for imprisonment in a Federal institution to be selected by him for the period of ten years, plus a fine of \$2,000, the defendant to stand committed for non-payment of the fine.

Pursuant to the same verdict as to Count 3, the defendant is committed to the custody of the Attorney General of the United States for imprisonment in a Federal institution to be selected by him for the period of five years, plus a fine of \$1,000, the defendant to stand committed for non-payment of the said fine.

The terms of imprisonment are concurrent: The fines are consecutive.

DEFENDANT'S REQUESTS TO CHARGE.

(1616) REQUEST No. 11.

If you find that any witness has willfully testified falsely as to any material fact, you must disregard his testimony as to that fact; you may reject and disregard his entire testimony.

In this connection I charge you that the term "material fact" includes facts bearing upon the credibility of the witness although not bearing directly upon the issues in this case. Facts going to the credibility of the witness who has given material evidence, are material facts within this rule, and if you find that any witness has willfully falsified with respect to any fact going to his credibility, you may disregard all of his testimony.

(1619) REQUEST No. 14.

The elements of the substantive offense which the defendant is charged with conspiring to commit in count 1 of the indictment are as follows: (1) the transmission (2) to the U. S. S. R. of (3) information relating to the national defense of the United States of America (4) with intent and reason to believe that the said information would be used to the advantage of the U. S. S. R. I charge you that unless you find that the defendant understood and was aware of each of the aforesaid elements which constitute the substantive offense which he is charged with conspiring to commit, you must acquit him on count 1.

(1620) REQUEST No. 15.

The elements of the substantive offense which the defendant is charged with conspiring to commit in count 2 of the indictment are as follows: (1) the receiving and obtaining (2) of documents connected with the national defense of the United States (3) for the purpose of obtaining information respecting the national defense of the

Defendant's Requests to Charge.

United States (4) with the knowledge that said documents would be transmitted to the U. S. S. R. and (5) intending that said documents would be used to the advantage of the U. S. S. R. I charge you that unless you find that the defendant understood and was aware of each of the aforesaid elements which constitute the substantive offense which he is charged with conspiring to commit, you must acquit him on count 2.

(1621) REQUEST No. 16.

The elements of the substantive offense which the defendant is charged with conspiring to commit in count 3 of the indictment are as follows: (1) the acting as agent of the Government of the U. S. S. R. within the United States, (2) without prior notification to the Secretary of State, (3) of persons who were not included among the accredited diplomatic or consular officers or attaches of the said Government of the U. S. S. R. I charge you that unless you find that the defendant understood and was aware of each of the aforesaid elements which constitute the substantive offense which he is charged with conspiring to commit, you must acquit him on count 3.

(1623) REQUEST No. 18.

You may not find the defendant to have been a co-conspirator, unless the unlawful acts charged were embraced within the common purposes of which he was aware. It is never permissible to enlarge the scope of the conspiracy itself by proving that some of the co-conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the defendant's understanding.

(1627) REQUEST No. 22.

You have heard the testimony of the witness Rhodes with respect to his activities in Moscow in 1951, 1952 and 1953. This testimony was admitted in order to corroborate

Defendant's Requests to Charge.

the testimony of the witness Hayhanen that he, Hayhanen, was asked by the defendant in 1955 to locate Rhodes. Under cross examination, Rhodes stated that he did not know the defendant or any of the co-conspirators named in the indictment. Nor is Rhodes himself named as a co-conspirator. I charge you that the activities of Rhodes in Moscow are not to be considered as the acts of a co-conspirator, and accordingly they are not binding upon the defendant.

Nor has the Government shown that the Russian nationals who, according to Rhodes, persuaded him to sell information, are connected in any way with the conspiracies here charged. I therefore charge you that the acts of the said Russian nationals are not binding upon the defendant.

Stipulation of Facts.

[SAME TITLE.]

(1639) IT IS HEREBY STIPULATED AND AGREED that the following is an accurate statement of facts and that these facts should be deemed part of the record on appeal.

At approximately 2:30 p.m. on Friday, October 25, 1957 during the course of the jury's deliberation, the jury by note requested the inspection of certain exhibits. The Government and the defense agreed that the request pertained to the following exhibits:

Defense Exhibits "B" and "E", which are portions of a translation of Hayhanen's statement to the Federal Bureau of Investigation; Government Exhibit 18, which is an enlargement of a microfilm in English relating to Sergeant Roy A. Rhodes; and Government Exhibit 64, which is a translation of the decoded message found in a split nickel by the witness Bozart.

The above exhibits were accordingly furnished to the jury in the jury room. No other exhibits were requested by the jury.

WILLIAM F. TOMPKINS,
Assistant United States Attorney
General.

JAMES B. DONOVAN,
Counsel for Rudolf Ivanovich Abel.

Judgment and Commitment.

[SAME TITLE.]

On this 15th day of November, 1957, came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty, of the offense of Violating T. 18, U. S. C., Sections 794(c), 793, 951, & 371, in that on or about and between 1948 and August 7, 1957 in the Eastern District of New York & elsewhere, he conspired to deliver & transmit to the USSR information relating to the national defense: and he conspired to receive, obtain information relating to national defense; and he acted as an agent of the USSR without prior notification to the Secretary of State as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of thirty (30) years on Count One and is sentenced to be imprisoned for ten (10) years and to pay a fine of \$2,000 on count Two and is sentenced to be imprisoned for five (5) years and to pay a fine of \$1,000 on Count Three and to stand committed until said fines be paid or he be discharged as provided by law. Sentences of imprisonment are to run concurrently and fines are to run consecutively.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Mar-

Notice of Appeal.

shal or other qualified officer and that the copy serve as the commitment of the defendant.

Mortimer W. Byers

United States District Judge.

(By)

Deputy Clerk.

The Court recommends commitment to:

(Signed)

Clerk.

Notice of Appeal.

[SAME TITLE.]

(1642) Appellant is Rudolf Ivanovich Abel, Federal House of Detention, New York, New York.

Appellant's attorney is James B. Donovan % Brooklyn Bar Association, 123 Remsen Street, Brooklyn, New York.

Offense: Conspiracy to transmit to a foreign government information relating to the national defense of the United States of America, in violation of Subsection (a) of Section 794, Title 18, United States Code; conspiracy to receive and obtain information relating to the national defense of the United States of America for the purpose of transmitting such information to a foreign government, in violation of Subsection (c) of Section 793, Title 18, United States Code; conspiracy to avoid registering as an agent of a foreign government, as required by Section 951, Title 18, United States Code, a violation of Section 371, Title 18, United States Code.

Notice of Appeal.

The judgment of conviction was entered on November 15, 1957.

Appellant was sentenced on November 15, 1957 as follows:

On Count One of the indictment, thirty years imprisonment;

On Count Two of the indictment, ten years imprisonment and a fine of \$2,000;

On Count Three of the indictment, five years imprisonment and a fine of \$1,000.

All sentences to run concurrently; the fines to be consecutive.

Appellant is presently confined at the Federal House of Detention, New York, New York.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above stated judgment.

Dated: New York, New York
November 21, 1957.

Yours, etc.,

JAMES B. DONOVAN,
Attorney for Defendant-Appellant,
Office & P. O. Address,
% Brooklyn Bar Association,
123 Remsen Street,
Brooklyn, New York.

To:

Honorable SYDNEY R. FEUER,
Clerk of the United States District
Court for the Eastern District of New York,
United States Courthouse,
271 Washington Street,
Brooklyn, New York.

[fol. 837]

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 331—October Term, 1957.

Argued April 16, 1958.

Docket No. 24968

UNITED STATES OF AMERICA, Appellee,

—v.—

RUDOLPH IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus, Appellant.

Before Clark, Chief Judge, and Lumbard and Waterman, Circuit Judges.

Appellant was convicted after a jury trial, Eastern District of New York, Byers, J. He appeals from the denial of his pre-trial motion to suppress certain evidence, from the denial of a motion to strike alleged surplusage from the indictment, and from the conviction, alleging insufficient evidence to warrant submission of the case to the jury, and reversible error during the trial. Affirmed.

[fol. 838] William F. Tompkins, Asst. Atty. Gen., Washington, D. C.; Cornelius W. Wickersham, Jr., U. S. Atty., E. D. N. Y., Brooklyn, N. Y.; Harold D. Koffsky, Kevin T. Maroney, Bruce J. Terris, Philip R. Monahan, James J. Featherstone, Attys., Dept. of Justice, Washington, D. C., for appellee.

James B. Donovan, Brooklyn, N. Y. (Arnold G. Fraiman, New York City; Thomas M. Deberoise, II, Woodstock, Vt., of counsel), for appellant.

OPINION—July 11, 1958

Waterman, Circuit Judge:

On August 7, 1957 a grand jury in the Eastern District of New York returned an indictment charging the appellant, Rudolph Ivanovich Abel, with having conspired to violate the espionage laws of the United States. Specifically, the indictment charged Abel with having conspired (1) to violate 18 U. S. C. §794(a) by communicating information concerning the national defense of the United States to the Union of Soviet Socialist Republics; (2) to receive and obtain material connected with the national defense of the United States for the purpose of transmitting such material to the Soviet government in violation of 18 U. S. C. §793(c); and (3) to violate 18 U. S. C. §951 by acting in the United States as an agent of a foreign government without prior notification thereof having been given to the Secretary of State. Prior to his trial upon this indictment, Abel moved pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for the return and suppression of certain evidence obtained by the Government as a result of an alleged unlawful search and seizure. The motion was heard by Judge Byers who, after a hearing, [fol. 839] denied it in an opinion reported at 155 F. Supp. 8. The appellant was tried to a jury and convicted on each of the counts in the indictment. On November 15, 1957 he was sentenced to a total of thirty years imprisonment.

The primary issue raised by this appeal is whether the Fourth Amendment prohibition of "unreasonable searches and seizures" was violated when government agents without a search warrant searched a hotel room occupied by Abel and seized certain articles which they found there. Also, we are called upon to determine whether there was sufficient evidence in the record to sustain a finding that Abel conspired to communicate to the Soviet Government information the transmission of which is prohibited by the espionage laws, see *United States v. Rosenberg*, 195 F. 2d 583 (2 Cir. 1952), *cert. denied*, 344 U. S. 838, *United States v. Heine*, 151 F. 2d 813 (2 Cir. 1945), *cert. denied*, 328 U. S. 833, and to determine whether the trial judge erred by receiving in evidence the testimony of a non-commissioned

Army officer that he cooperated with the Soviet Government while serving in the American embassy in Moscow. And lastly, counsel for the appellant urge that a new trial is required because the cumulative effect of a variety of minor errors alleged to have occurred during the trial was such that the appellant did not have a fair trial.

In early May 1957 one Reino Hayhanen entered the American embassy in Paris and informed the officials there that he was an espionage agent in the United States for the Soviet government. Hayhanen was interrogated by the officials and later was flown back to the United States where he was questioned by agents of the Federal Bureau of Investigation. It was largely from the testimony of Hayhanen, though there was evidence from other sources as well, that the jury learned of the appellant's activities in the United States. Although there is no dispute about the sufficiency of the evidence to prove concerted activity between Abel and others on behalf of the Soviet government, a brief résumé of the record developed at the trial will be useful to indicate the scope of the conspiracy which was proved and the means by which its purposes were to be accomplished.

Abel is a native of Russia, a citizen of the U. S. S. R., and a Colonel in the K. G. B., an espionage agency of the Soviet government. By his own admission he entered this country illegally in 1948 at an unknown point along the Canadian border. After this illegal entry the appellant, whose cryptonym is "Mark," adopted several aliases, one of which was Emil Robert Goldfus, the name of an infant who had died in New York City in 1903; while another was Martin Collins, a fictitious individual purportedly born in New York City. At the time of his arrest, on June 21, 1957, Abel was residing at the Hotel Latham in Manhattan and had rented an artist's studio in Brooklyn.

Hayhanen was also an agent of the K. G. B. and at the time of Abel's arrest held the rank of Lieutenant Colonel, though at the time he entered this country several years earlier he had been a Major. Hayhanen entered this country in 1952 with the passport and identity of one Eugene N. Maki, a native of the United States who had left this coun-

try for Russia in 1927.¹ Upon his arrival in New York City Hayhanen, according to his instructions, placed a tack in a designated sign in Central Park. This prearranged signal was the means by which he was to notify Soviet agents in New York that he had arrived safely and was not under surveillance.

[fol. 841] Prior to the time that he had left the U. S. S. R. Hayhanen had received extensive training in the techniques of espionage. Thus, he was given instruction in photography with emphasis on making "microdots"² and "soft film."³ He was also taught how to secrete messages in hollowed out objects such as coins, bolts, screws and match books. In addition, he was given training in cryptography and assigned the cryptonym "Vik" which he was to use when communicating with other espionage agents. Hayhanen was also advised of the location of three "drops" in New York City. A "drop" is a hiding place used for the transmission of messages concealed in containers. Hayhanen was instructed to use these "drops," which were located in a wall on Jerome Avenue in the Bronx, a bridge in Central Park, and a lamp post in Fort Tryon Park,⁴ in communicating with his superiors.

¹ Hayhanen's testimony revealed the elaborate detail with which this illegal entry into the country had been planned. In 1949 he was smuggled into Finland by Soviet officials and remained there until 1952 when he embarked for the United States. During this time he assumed the identity of Maki and received funds with which to pay individuals in Finland so that they would be willing to state that he had lived in that country since 1943.

² "Microdot" is the term ordinarily used for a photographic reduction of a document which is capable of being enlarged so as to be readable. Hayhanen also received instructions on this subject from Abel after he had met the latter in this country.

³ "Soft film" is made from ordinary film by chemically treating the latter so as to remove its backing. The significance of "soft film" for espionage purposes is that it is pliable and capable of being folded to a small size.

⁴ The location of the "drops" was changed from time to time, but each was regularly assigned a number. Whenever Hayhanen had a communication for his superiors which he had concealed in a "drop," he would make a horizontal line in colored chalk on a slat in a designated fence in Central Park, the number of the slat, counting from the street side, corresponding to the number of the "drop" at which the message had been left.

Hayhanen had been sent to this country to serve as an assistant to an individual whom he then knew only as "Mark." Nevertheless, he did not meet Abel until the summer of 1954 when the two of them met in the men's smoking room at a theatre in Flushing. As far as appears, the only significance of this meeting was that Abel expressed some concern that Hayhanen obtain "cover work" [fol. 842] which would not interfere with his espionage duties.⁵ Thereafter, Hayhanen saw Abel frequently, received his salary from him, and carried out several missions at his direction. On several occasions he saw Abel make use of "drops" which had been assigned to him and once was told by the appellant that the latter had several agents under him. Abel admitted to Hayhanen that he had received coded messages and on one occasion Hayhanen observed Abel attempting to receive the signals of a short-wave radio station. This attempt was unsuccessful. Also unsuccessful were attempts by Abel to find a suitable location for the establishment of a radio station which he had received instructions from Moscow to establish.

The record contains no indication that Abel or any of his colleagues were ever successful in transmitting to the Soviet Government any information pertaining to the national defense, but as the legality of a conspiracy is not to be judged by its success, the failure to show success is of no relevance. *United States v. Rabinowich*, 238 U. S. 78 (1915); *United States v. Morello*, 250 F. 2d 631 (2 Cir. 1957). Considerable evidence is contained in the record establishing a continuous activity by the appellant on behalf of the Soviet government. This evidence need not be considered in detail; it will be sufficient to describe a particular episode which is relevant to issues raised by Abel on this appeal.

Sometime between July and December 1954 Abel received instructions from Moscow to locate a Soviet agent named Roy Rhodes, whose cryptonym was "Quebec." The instructions stated that Rhodes' wife owned several garages

⁵ "Cover work," as Hayhanen testified, is a means of visible support, necessary to avoid arousing suspicion concerning the activities of an agent.

in Red Bank, New Jersey, but when, in late 1954, Abel and Hayhanen went to Red Bank they were unable to locate Rhodes. Abel instructed Hayhanen that in the latter's [fol. 843] next message to Moscow he should request additional information about Rhodes. Hayhanen received a reply stating that Rhodes' family lived in Colorado and by some means not apparent from the record he and Abel were able to determine that the family lived in the town of Salida. Abel instructed Hayhanen to take a trip to Salida. Prior to the time that Hayhanen left, he and Abel went to the Central Library in Manhattan and obtained the name and telephone number of Rhodes' father. Hayhanen called this number when he arrived in Salida, stated that his name was Mike and that he would like to contact Rhodes. The party on the other end of the line, subsequently identified as Arlene Brown, a sister of Rhodes, informed Hayhanen that Rhodes was living in Tucson, Arizona. Hayhanen returned to New York and reported to Abel. Though there was some discussion as to whether Hayhanen should go to Tucson, Abel finally decided against it.

A discussion of Rhodes' role in the Soviet espionage system may be deferred until that portion of the opinion which deals with the admissibility of his testimony at the trial below. It is sufficient at this point to note the reason why Abel and his colleagues were so anxious to locate Rhodes. In the words of the witness Hayhanen:

"He [Abel] said that Quebec could be a good agent because he is—some of his relatives are working on—and he—on military lands.

"He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was."

In the summer of 1955 the appellant took a trip to the U. S. S. R. He and Hayhanen did not meet again until the following summer. At that meeting and during the next few months, arrangements were made for Hayhanen to travel to Russia on leave. Hayhanen left New York aboard [fol. 844] the *Liberté* on April 24, 1957. Shortly after arriving in Paris, he notified other Soviet agents, by prearranged signal, that he had arrived safely and that he was proceed-

ing to West Berlin. Instead of proceeding with this plan, he went to the American embassy where he informed the officials of his activities.

As a result of these disclosures agents of the F. B. I. began an intensive investigation of the appellant—an investigation which led to his arrest on June 21, 1957 by agents of the Immigration and Naturalization Service.

I. Search and Seizure

The search and seizure issue raised by the appellant involves three separate and distinct questions: (1) whether agents of the Immigration and Naturalization Service, when making a valid arrest pursuant to a deportation arrest warrant,⁶ may, as an incident of the arrest, conduct a search of the hotel room in which the arrest is made without possessing a search warrant; (2) whether it was "clearly erroneous" for the distinguished trial judge to have found that the search conducted by the I. N. S. agents in the present case was conducted in good faith solely for the purpose of discovering weapons and evidence of alienage; or whether, contrary to that finding, the agents' true purpose in searching Abel's hotel room was to discover evidence of his espionage activities; (3) whether, assuming that the search was conducted in good faith, the articles seized by the I. N. S. agents might lawfully be seized in the absence of a search warrant.

[fol. 845] Proper understanding of the several facets of the search and seizure issue raised by the appellant necessitates that we state in some detail the circumstances surrounding his arrest and the search of his hotel room. For, as the Supreme Court has frequently observed, only "unreasonable searches and seizures" are prohibited by the Fourth Amendment, and the determination of whether a search or seizure is unreasonable depends upon the par-

⁶ 8 U. S. C. §1252(a) provides that "Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody." Pursuant to the authorization of delegation contained in 8 U. S. C. §1103(a), regulations have been promulgated authorizing the issuance of warrants by district directors of the Service. 8 C. F. R. 242.2(a).

ticular facts and circumstances of each case. See *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Harris v. United States*, 331 U. S. 145 (1947).

Almost immediately after Hayhanen's disclosures in early May of 1957, agents of the F. B. I. placed Abel under surveillance. On several occasions he was observed at 252 Fulton Street in Brooklyn, the address of the studio which he had rented. Also, on a date which does not appear in the record, F. B. I. agents rented the room in the Hotel Latham immediately adjacent to that occupied by Abel under the name of Martin Collins. Meanwhile, Hayhanen, who had been flown from Paris to New York, continued his cooperation with United States officials and directed F. B. I. agents to various espionage materials which he accused Abel of having given to him.

On June 13 agents of the I. N. S. were for the first time informed that the F. B. I. had information concerning an alien illegally in this country. This information was conveyed by one Sam Papich, the F. B. I. liaison officer with the I. N. S., to Mario T. Noto, Deputy Assistant Commissioner for Special Investigations of the I. N. S. Noto was also informed that there was evidence that the suspect, Abel, had engaged in espionage. At Noto's request Papich stated that he would attempt to obtain additional information relating to Abel's illegal entry and his status in the United States. Noto testified at the hearing on the motion [fol. 846] to suppress that he had not asked Papich for any information concerning Abel's espionage activities "because my interest from a jurisdictional viewpoint is confined to the illegal status which he had in the United States." Noto further testified that Papich had not requested I. N. S. to treat the case in any particular manner and that, aside from this request by him for further information, no arrangements for cooperation were made between the two departments. Approximately a week later Papich returned and gave Noto the additional information which the latter had requested, including the fact that the suspect's true name was Rudolph Abel, that he had entered the country by way of Canada, that in so doing he had used a birth certificate which was not his own, and that he had stated to several persons that he was in this country illegally.

Noto was also informed that Abel was an officer in the Soviet espionage system. Prior to this time, Noto had conducted a search of I. N. S. records to determine whether I. N. S. had any information concerning the suspect.

After obtaining this additional information from Papich, and after acquainting General Swing, the Commissioner of the I. N. S., with the details of the case, Noto again met with F. B. I. agents. At one point during this meeting he informed the agents that he "would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes . . ." Later, he informed the agents that he would "very quickly" order the arrest of Abel for "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act which makes it a deportable offense." On June 20 Noto met with two [fol. 847] other I. N. S. officers and informed them for the first time of the Abel case. These three men then went to the offices of the F. B. I. where the evidence against Abel was again reviewed. The I. N. S. officials agreed that the evidence was sufficient to justify issuance of a "show cause" order as to Abel's deportability and that an administrative arrest warrant should be drawn. The decision to use an administrative warrant was, in effect, a decision that Abel should be held for a deportation hearing and not apprehended as one charged with a criminal offense; but at the hearing on the motion to suppress Noto testified that in his expert opinion the election to commence deportation proceedings would not preclude a subsequent criminal prosecution. Noto testified that he alone made the decision as to the type of proceeding which was to be initiated.

The "show cause" order and arrest warrant were drawn in Washington and Noto instructed two I. N. S. agents to take them to New York to be signed by John Murff, Acting District Director of the I. N. S. there, after which they were to supervise the arrest of Abel. The agents were also instructed to communicate with the F. B. I. office in

The failure of an alien to notify the Attorney General of his address as required by 8 U. S. C. §1305 is a criminal offense under 8 U. S. C. §1306 and constitutes grounds for deportation under 8 U. S. C. §1251.

New York. Noto testified that this latter instruction was given on his own initiative and that it had not been requested by agents of the F. B. I. The I. N. S. agents went to New York where they carried out the instructions which Noto gave them. After Murff had signed the "show cause" order and arrest warrant, the I. N. S. agents communicated with the agents of the F. B. I. who requested an opportunity to talk with Abel prior to his arrest. The purpose of this request, which was granted by the I. N. S. officials, was to determine whether Abel would agree to "cooperate." Agent Farley, one of the I. N. S. agents who made the arrest, testified that his instructions were to make it; and that, contrary to appellant's contention, he received no [fol. 848] instructions that the arrest was to be contingent upon whether or not appellant agreed to cooperate with the F. B. I. agents.

At approximately 7:00 A.M. on June 21, while I. N. S. agents waited in an adjoining room, agents of the F. B. I. knocked on the door of Abel's hotel room and gained admittance to it. They showed Abel their credentials and informed him that they were charged with the duty of investigating matters pertaining to the internal security of the United States. Abel, whom the agents addressed as "Colonel," was asked a number of questions, some of which he answered. He declined to reply to others. He was told that the agents had information that he had engaged in espionage and that his "cooperation" was solicited. He was also told that if he did not "cooperate," he would be arrested before he left the room. After nearly a half hour of questioning, the F. B. I. agents decided to have the I. N. S. agents arrest the appellant, and one of them left the room to so notify them. Thereupon, the I. N. S. agents entered the room and arrested Abel. They then searched the room for the purpose, according to their testimony, of finding either weapons or evidence of alienage. It is undisputed that the F. B. I. agents, though present when the search was made, did not participate in it. The only articles seized during this search were: (1) a birth certificate in the name of "Martin Collins"; (2) a birth certificate in the name of "Emil Goldfus"; (3) an international certificate of vaccination issued in the name of "Martin

Collins"; and (4) a bank book issued by the East River Savings Bank in the name of "E. R. Goldfus."

While they were in Abel's room the I. N. S. agents also seized three slips of paper, only one of which was offered and admitted into evidence. These slips were seized under the following circumstances: The agents told Abel that [fol. 849] he could pack and take with him anything that he desired. When he had finished packing he asked for and received permission to repack one of his bags. While he was repacking the bag, one of the I. N. S. agents noticed that he was trying to secrete some papers in his sleeve. These papers then were seized by the agent. The one that was introduced into evidence was a strip of graph paper containing a coded message in grouped digits.

Abel gave agent Farley a sufficient amount of money to pay the rent for his room until 3:00 P.M. of that day, and this money was paid to the hotel by another agent who promptly checked Abel out. At approximately 8:30 A.M. the I. N. S. agents left the hotel with Abel and drove to the district office of the I. N. S. As soon as they had left, F. B. I. agents inquired of the hotel manager whether Abel had "checked out" and, upon receiving an affirmative answer, they requested and received from the hotel manager a written consent to search the room which Abel had occupied. When these agents searched the room they seized the entire contents of a wastebasket which partially consisted of articles which Abel had discarded while packing. Only two articles seized during this search were offered and admitted into evidence: a piece of wood wrapped in sandpaper and containing a cipher pad, and a hollowed-out wooden pencil containing microfilm.

On these facts Judge Byers, who heard the motion to suppress, rejected the appellant's contention that federal agents had violated the Fourth Amendment. He held that I. N. S. agents making an arrest pursuant to an administrative warrant may, as an incident of that arrest, conduct a search of the hotel room in which the arrest is made, and he found that the search of Abel's room was made in good faith for the purpose of discovering weapons and evidence of alienage and not for the purpose of uncovering [fol. 850] evidence of Abel's espionage activities. For the

reasons hereinafter stated we agree with this conclusion of law and decline to reverse this finding of fact.

A. Lawfulness of Search Incident to Arrest upon Deportation Charges.

With the single exception of *Trupiano v. United States*, 334 U. S. 699 (1948), overruled in *United States v. Rabino-witz, supra*, the Supreme Court has consistently held that government agents may, as incident to a lawful arrest, conduct a search of the premises where the arrest is made. *Harris v. United States, supra*; *Aguello v. United States*, 269 U. S. 20 (1925). Counsel for the appellant point out that in every case in which such a search has been upheld the arrest was made for the commission of a crime. Relying upon *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952), in which deportation proceedings were characterized as civil rather than as criminal proceedings, counsel urge that the issuance of the administrative arrest warrant and the apprehension of appellant pursuant to it did not confer upon the arresting officers the right to search the hotel room in which the arrest was made. Some support for this position may be found in *Robinson v. Richardson*, 13 Gray 454 (Mass. 1859) in which the Supreme Judicial Court of Massachusetts held a Massachusetts statute invalid as authorizing "unreasonable searches and seizures" because it provided for the issuance of warrants to search for the property and books of account of insolvent debtors. During the course of its opinion, later cited with approval in *Boyd v. United States*, 116 U. S. 616 (1886), the court pointed out that "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was [fol. 851] confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals." 13 Gray at 456. Nevertheless, although the Massachusetts court mentioned the civil nature of the proceedings, later portions of its opinion indicate that the main objection it found to the use of a search warrant the statute authorized was that it "is to be used

exclusively * * * as a remedial process in cases where nothing but a personal claim or the right to prosecute a private suit is involved." 13 Gray at 457 (emphasis supplied).

By contrast, deportation, like punishment for crime, as Judge Byers stated below, "is initiated in the interests of the United States and for the protection of its citizens. * * *" 155 F. Supp. at 10. The similarity between criminal actions and deportations is attested to by the fact that the identical charges upon which Abel was arrested may be made the subject either of a criminal prosecution, 8 U. S. C. §§1306, 1325, or a deportation hearing, 8 U. S. C. §§1251 (a)(1), 1251(a)(5). Moreover, the procedure applicable to deportation proceedings, though in some respects different than that applicable to criminal proceedings, see *Carlson v. Landon*, 342 U. S. 524, 537 (1952), is in many ways similar. Arrest and detention are provided for by statute, see 8 U. S. C. §1252(a), and indeed have been recognized by the Supreme Court as a necessary part of the deportation procedure. *Carlson v. Landon*, *supra*, at 538.

With these similarities in mind, there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience [fol. 852] which justify the former are no less strong in the case of the latter.*

* As far as we have been able to determine, the Third Circuit appears to be the only appellate court to have considered the power of I. N. S. agents to conduct a search as incident to a lawful arrest in connection with deportation proceedings. See *Diogo v. Holland*, 243 F. 2d 571 (3 Cir. 1957); *Da Cruz v. Holland*, 241 F. 2d 118 (3 Cir. 1957). Both of those cases were decided *per curiam*, and neither contained a discussion of the problem, but in each case the court apparently assumed that searches made by I. N. S. officers incident to lawful arrest are not unlawful *per se*. In *Taylor v. Fine*, 115 F. Supp. 68, 70 (S. D. Cal. 1953), Chief Judge Yankwich stated by way of dictum that "Incidental to a legal arrest whether with or without a warrant, the officers [I. N. S. agents] may conduct a reasonable incidental search," but each of the cases which he cited in support of this proposition involved a criminal prosecution.

Of course, as counsel for the appellant point out, the warrant upon which Abel was arrested was an administrative warrant and hence was not issued under the safeguards associated with judicially issued warrants of arrest. Nevertheless, the search by the I. N. S. agents was not rendered unlawful on that account. Searches conducted as incident to a lawful arrest have frequently been upheld by the courts even though the arrest was made without issuance of any process. See *e.g.*, *Agnello v. United States*, *supra*, at 30; *Marron v. United States*, 275 U. S. 192, 198-99. And, in this Court at least, it has long been settled that a search conducted pursuant to an arrest made without a warrant is not dependent upon the urgency of the situation. In *United States v. Lindenfeld*, 142 F. 2d 829 (2 Cir. 1944), we sustained the validity of a search without a warrant as incident to an arrest without a warrant where the lawfulness of the arrest was due to the fact that a felony had been committed (though not in the presence of the arresting officers) and the arresting officers had probable cause for believing that the person arrested had committed it. Cf. *United States [fol. 853] v. Jones*, 204 F. 2d 745 (7 Cir. 1953). In view of these decisions, we hold that the search by the I. N. S. agents was lawful even though the arrest was not authorized by a judicially issued warrant for the arrest of appellant.

B. *Lawfulness of Search—"Good Faith" of Arresting Officers.*

The appellant next contends that the search conducted by the I. N. S. agents was unreasonable and violated the Fourth Amendment because the true objective of the arresting officers who conducted the search was to uncover evidence of espionage rather than to discover weapons or evidence of alienage. Cf. *Harris v. United States*, *supra*. This contention, vigorously denied by the Government, was rejected by Judge Byers who, at a pre-trial hearing upon appellant's motion to suppress the articles seized, found that the arresting officers in good faith searched Abel's hotel room for the purpose of finding weapons or evidence of alienage. This finding may not be set aside unless, from a survey of

the record, we are convinced that it was clearly erroneous. *Davis v. United States*, 328 U. S. 582 (1946). Examination of the record developed at the pre-trial hearing on appellant's motion to suppress demonstrates that there is an adequate foundation to support Judge Byers' finding. To be sure, the I. N. S. first learned of Abel's illegal presence in this country from the F. B. I., but that does not indicate that the I. N. S. search was not made in good faith. Nor does the fact that F. B. I. agents received permission to question Abel prior to his arrest by I. N. S. agents indicate that the I. N. S. agents did not act in good faith. In effect, appellant's attack on the trial judge's finding amounts to an argument that it is absurd to believe that two law enforcement agencies of the Government, both integral parts of the [fol. 854] Justice Department, would limit themselves to searching for evidence of alienage when they had more than ample reason to suspect that the inhabitant of the room which they were searching was a high-ranking espionage agent in the employ of a foreign government. We do not deny that such an inference might be drawn from the evidence, but the reasonableness of such an inference is not presently before us. The only question before us is whether the evidence in the record supports the finding of good faith made by the court below. The answer to that question must clearly be in the affirmative.

Noto testified that the interest his Service had in the appellant was confined to the latter's illegal presence in the United States. He further testified the only role played by F. B. I. agents in connection with the arrest was that they provided the I. N. S. with information concerning Abel's illegal status; and that he alone, with no request from the F. B. I., decided to arrest Abel and to institute deportation proceedings rather than a criminal prosecution. One of the I. N. S. agents who made the arrest testified that he had not received instructions to effect the arrest only if Abel refused to "cooperate" with the F. B. I. and that he had not been instructed to search for evidence of espionage. Both this agent and another I. N. S. officer testified that they were searching for evidence of alienage. Surely we cannot hold that the trial judge was bound to reject this direct evidence of good faith and instead base his finding upon

the unsupported and contradicted inference which the appellant urges.

The appellant, by affidavit, sought to sustain his version of the purpose of the search by presenting to the court an article printed in the New York Herald Tribune, under date of August 12, 1957, purportedly setting forth certain [fol. 855] statements made by Lieutenant General Joseph M. Swing, Commissioner of the I. N. S.*

The article reported that General Swing had stated that the arrest of Abel "was made at the specific request of 'several government agencies' . . ." and "that Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it." At the very most, the content of this newspaper article if worthy of any court consideration at all only created a conflict in the record which the trial judge was empowered to resolve. Beyond this, however, we see no reason why the trial judge should have credited this multiple hearsay. Not only was the newspaper report itself hearsay, but, on the testimony of Notø, it is clear that General Swing had

* The pertinent portions of the article are as follows:

SPY HUNTERS HAD EYE ON ABEL A YEAR

ARREST MADE AT THEIR REQUEST

By RICHARD C. WALD

The immigration authorities' arrest of alleged master spy Rudolph Ivanovich Abel was made at the specific request of "several government agencies," it was revealed yesterday by Lt. Gen. Joseph M. Swing, Commissioner of Immigration.

"We were well aware of what he was when we picked him up," Gen. Swing said. "Our idea at the time was to hold him as long as we could."

Gen. Swing indicated that Abel would not have been arrested by Immigration officials on June 21 if American counter-intelligence had not requested it. The commissioner said he could not comment, however, on which agencies provided the information or asked for the arrest. In all cases, it is standard Immigration Service procedure to notify all government intelligence agencies of a pending arrest before it is made, he said.

.

no first-hand knowledge of the extent of cooperation between the I. N. S. agents and those of the F. B. I.¹⁰ [fol. 856] Moreover, the direct testimony by I. N. S. agents as to the purpose for their search is corroborated by evidence in the record as to the articles seized by them during their search. As we have previously noted, the only articles seized by the I. N. S. agents during their search of the hotel room were (1) the Martin Collins birth certificate, (2) the Emil Goldfus birth certificate, (3) the international certificate of vaccination in the name of Martin Collins, (4) a bank book issued by the East River Savings Bank to E. R. Goldfus, and (5) several slips of paper which the agents observed Abel trying to secrete in his sleeve. Clearly the seizure of the first four items was wholly consistent with a search conducted to obtain evidence of alienage, for these items were "the instrumentalities and means" by which Abel was able to maintain his illegal status in this country. See *Harris v. United States*, *supra*, at 154. And the fact that the agents limited themselves to only seizing these articles is convincing evidence that their search was conducted in good faith. The later seizure of the slips of paper by the I. N. S. agents does not reflect adversely on their good faith, for it is undisputed that these slips were taken only after Abel was detected trying to hide them. The agents' good faith obviously was not impugned by their seizure of what the arrested man had tried to hide.

¹⁰ It should be noted that even if the newspaper report of the interview with General Swing were to be credited, then there would only be evidence that the arrest was made at the request of counter-intelligence. This would not be inconsistent with the direct evidence that the search incident to the arrest was conducted solely for the purpose of discovering evidence related to the offense charged in the administrative arrest warrant.

We have related in considerable detail the evidence in the record bearing upon the amount of cooperation between the F. B. I. and the I. N. S. and, also, the extent to which the I. N. S. restricted its activities to performance of its statutory duties. We have done so because in our opinion this evidence bears importantly upon the "good faith" with which the I. N. S. agents conducted the search. It should be clear that we have no intention of suggesting that it would be improper for these two agencies of the Department of Justice to cooperate with each other.

[fol. 857] C. *Lawfulness of Seizure.*

The appellant contends, however, that even though the search was lawful and even though it was conducted in good faith, the seizure by the I. N. S. agents was unreasonable because the articles seized did not relate to the offense charged in the arrest warrant. We consider this contention only insofar as it pertains to the taking from Abel's person of the papers which he had attempted to hide, for as we have indicated above, with the exception of these papers, everything seized by the I. N. S. agents related to the offense charged in the warrant of arrest. In *Harris v. United States, supra*, agents of the F. B. I., acting under the authority of two warrants of arrest charging the defendant with mail fraud, went to his apartment and arrested him there. Incident to the arrest they searched the apartment and while they were doing so discovered and seized eight Notice of Classification cards and eleven Registration Certificates, the possession of which by the defendant was in violation of the Selective Training and Service Act of 1940, 54 Stat. 885, and of Section 48 of the Criminal Code, 35 Stat. 1098. The defendant was later convicted upon an indictment charging him with unlawful possession, concealment and alteration of the seized articles. The admission into evidence of the seized articles, over objection of the defendant, was upheld by the Supreme Court on the ground that the F. B. I. agents had undertaken the search in good faith for the purpose of discovering evidence concerning the crime charged in the warrant. It is true that in *Harris* the seized objects were government property unlawfully in the possession of the defendant and that the Supreme Court somewhat relied upon that fact in holding them subject to seizure, see 331 U. S. at 155, but that circumstance would not appear to be a limiting factor upon the applicability of the *Harris* decision. Earlier in its opinion the Court had [fol. 858] stated that "the objects sought for and those actually discovered were properly subject to seizure." 331 U. S. at 154. It then went on to differentiate between "merely evidentiary materials * * * which may not be seized * * * and those objects which may validly be seized including the instrumentalities and means by which a crime is

committed * * * and property the possession of which is a crime." Thus it appears that the circumstance that the seized articles in the *Harris* case were government property unlawfully in the possession of the defendant was relevant only insofar as it was necessary to show that because they were such articles they were among the four classes of items properly subject to seizure.¹¹ Cf *Kelly v. United States*, 197 F. 2d 162 (5 Cir. 1952); *United States v. Braggs*, 189 F. 2d 367 (10 Cir. 1951). Similarly, the papers taken from Abel's person were subject to seizure, for it is clear that they were the "instrumentalities and means" by which he might commit the crime of espionage.

Of course, as Judge Learned Hand has observed in *United States v. Poller*, 43 F. 2d 911 at 914 (2 Cir. 1930), "[T]he real evil aimed at by the Fourth Amendment is the search itself * * *". Since the only proper motive which may impel government agents to conduct searches in connection with an arrest is the desire to obtain information which will be helpful in the prosecution of the crime for which the arrest is made, we well recognize that by placing "limitations upon the fruit to be gathered [from such a search we] tend to limit the quest itself * * *". *United States v. Poller, supra*, at 914.

[fol. 859] However, in a case such as the present one, where the trial court properly has been convinced that the motivation for the search is the hope of obtaining evidence of the offense for which the arrest is being made, the constitutional prohibition against unreasonable searches is not transgressed; and hence, when, during such a permissible search, articles within the categories enumerated in *Harris* that were not searched for are in fact discovered no useful purpose would be served by prohibiting seizure of them if they tend to prove the commission of a crime even though the crime be unrelated to the crime for which the arrest is being made. Here, obviously, any limitation we might

¹¹ The four classes of objects enumerated in *Harris* as properly subject to seizure during a lawful search are: (1) the instrumentalities and means by which a crime is committed, (2) the fruits of the crime, such as stolen property, (3) weapons by which the escape of the person arrested might be effected, and (4) property the possession of which is a crime: 331 U. S. at 154.

put upon the use that can be had of articles uncovered by the search would not "tend to limit the quest * * *"

We construe the rule in *Harris* as not being limited to its own facts or to situations in which the seized objects uncovered in good faith by a not unreasonable search happen to be contraband, for there is no valid distinction in holding lawful the seizure of contraband and in holding unlawful seizures of articles which fall within the other categories enumerated in that case. Therefore, we hold that the seizure by I. N. S. agents of the slips of paper which Abel attempted to secrete was not in violation of the Fourth Amendment.

II. *Sufficiency of the Evidence.*

As we have previously indicated, the record contains more than ample evidence to establish that the appellant, while in this country, conspired with others to act on behalf of the Soviet Government. He contends, however, that there is inadequate evidence in the record to support the charges in Counts 1 and 2 of the indictment that the purpose of the conspiracy was to gather and transmit to the U. S. S. R. information relating to the national defense of the United States. In this connection, reliance is placed upon *United* [fol. 860] *States v. Heine, supra*, in which we reversed a conviction under 18 U. S. C. §34, the predecessor of 18 U. S. C. §794(d), because the evidence established that the information communicated by the defendant to the foreign government by whom he was employed was "lawfully accessible to anyone who was willing to take the pains to find, sift and collate it * * *" 151 F. 2d at 815. The appellant contends that there is no evidence in the record which indicates that he ever succeeded in communicating or conspired to communicate any information other than the type which we held could lawfully be sent abroad in the *Heine* case.

It is true that there is no evidence indicating that Abel or his co-conspirators ever succeeded in gathering or in transmitting any unlawful information. There is not the slightest hint in the record that these espionage agents met with any success. However, appellant was charged,

with and convicted of having conspired with others in a criminal conspiracy to gather and transmit to the Soviet government secret information pertaining to the national defense of the United States, and the record is abundantly clear that Abel knew of the unlawful purpose of this conspiracy. The conspirators' lack of success, if indeed they were unsuccessful, does not lessen the criminality of their activities. *United States v. Rabinowich, supra; United States v. Morello, supra.*

Hayhanen was sent to this country by the Soviet government to act as Abel's assistant and for several years he acted in this capacity. During his direct examination he testified as follows:

"Q. Now, let me ask you this directly: What type of information were you seeking? A. Espionage information.

Q. Would you describe that, what you mean by espionage information? A. By espionage information [fol. 861] I mean all information what you can look to get from newspapers or official way, by asking from, I suppose, legally from some office, and I mean espionage information that kind of information what you have to get illegal way. That is, it is secret information for—

The Court: Concerning what? What kind of information?

The Witness: Concerning national security or—

The Court: What do you mean by that?

The Witness: In this case United States of America.

The Court: What do you mean by national security?

The Witness: I mean it—that some military information or atomic secrets."

The appellant seeks to denigrate this testimony by characterizing it as a "clearly rehearsed statement of a legal conclusion." We do not so understand it. Hayhanen did not merely testify that the purpose of the conspiracy was to obtain "espionage information" or "secret information

concerning the national security," but he specifically mentioned obtaining "military information or atomic secrets." His failure to elaborate in more detail concerning the information which the conspirators sought to acquire is readily explainable in light of his prior response to the following question:

"Q. During this conversation or during the receipt of these oral instructions from Pavlov,¹² did he give [fol. 862] you any directions as to the type of information? A. Yes, he did.

He told that it depends what kind of illegal agents I will have, so it depends then what kind of information they can give, where they work or whom they have as friends and such and such things. * * *

Under these circumstances, it is not surprising that Hayhanen's testimony did not reveal any specific plans for obtaining secret information. His failure to so testify is indicative only of the fact that he had never been successful in his nefarious activities. He did, however, testify to a sequence of events which not only provided additional information tending to prove the purpose of the conspiracy but also tending to prove that Abel was aware of that purpose. This is the testimony relative to the attempts which he and Abel made, under orders from Moscow, to locate Sergeant Rhodes. The reason why Abel had been ordered to locate Rhodes has already been indicated:

"He [Abel] said that Quebec [Rhodes] could be a good agent because he is—some of his relatives are working on—and he—on military lands.

—He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was."

Surely the jury was justified in inferring from this testimony that Abel and his co-conspirators were interested in

¹² Pavlov was named in the indictment as a co-conspirator and at the trial was shown to be in charge of the American espionage section of the Soviet State Security Service.

establishing contact with Rhodes because of their belief that he was a potential source of secret atomic information.

Moreover, the jury cannot have failed to be impressed by the elaborate precautions taken by the conspirators to keep their activities secret. Men intent upon gathering and transmitting only such information as is available to the general public do not ordinarily find it necessary to employ [fol. 863] secret codes; microdots; hollowed-out coins, pencils, or matchbooks; "drops"; and the variety of other devices which Abel and his colleagues used. To be sure, the defendant in *Heine* had employed devious methods to transmit information which this Court later held might lawfully be transmitted, but our reversal of his conviction does not establish that evidence of such devious methods has no probative value. In *Heine* the information which the defendant had gathered and transmitted was known to the court. No room was left for inference. The present case is quite the contrary. Abel and his co-conspirators—unlike Heine and his—did not, as far as we know, succeed with their plans. Hence, an inference as to their purpose is properly drawn from the methods which they employed. We do not intimate that proof of the methods alone would be sufficient to sustain a conviction. We merely hold that the justifiable inference from the use of such methods by the appellant and his associates, when considered together with the other evidence which we have discussed, was sufficient to justify the jury in finding that the object of the conspiracy in the present case was to gather and transmit to the U. S. S. R. information concerning the national defense of the United States which was not "lawfully accessible to anyone who was willing to take the pains to find, sift and collate it * * *" 151 F. 2d at 815.

III. *Admissibility of Rhodes' Testimony.*

Roy A. Rhodes, a master sergeant in the United States Army, was called as a witness by the Government, and, insofar as relevant, testified substantially as follows: In 1951, at which time he had been in the Army for nearly a decade, he was assigned to serve as Motor Sergeant at the American Embassy in Moscow. When he arrived in Moscow, in May 1951, he was not accompanied by his family,

but in December of that year he received notification that [fol. 864] the Soviet government had granted visas to his wife and child and that they would be able to join him. To celebrate this good news, Rhodes had several drinks after lunch and before going back to work. When he returned to work he continued his drinking, now in the company of two Russian nationals who were employed at the Embassy garage apparently as assistants to Rhodes. Late that afternoon the girl friend of one of the Russians came to the garage with a female companion. It was suggested, and Rhodes agreed, that the two women, Rhodes, and one of the Russians employed at the embassy should go out for dinner. The foursome spent the evening together, dancing, drinking and eating. The following morning, according to Rhodes' testimony, he "woke up * * * in bed with this girl in what I had taken to be her room." He did not see this woman again for several weeks, but then, in response to a telephone call, he arranged a meeting with her. At this meeting he was told that "she has trouble." During the course of this discussion Rhodes and the woman were joined by two men, one of whom was introduced as the woman's brother, and the other as "Bob Day" or "Bob Smith." Rhodes thereafter had quite a number of meetings with Soviet citizens, some of whom were civilians and some of whom were members of the military. At these meetings Rhodes was given varying sums of money by the Russians, totaling between \$2500 and \$3000, in exchange for information which he gave them. The information for which he was paid concerned, *inter alia*, his duties at the embassy and the personal habits of American military and State Department personnel.

Rhodes also testified that in June 1953 he was transferred from Moscow to San Luis Obispo, California. Prior to his transfer, the fact of which he communicated to Soviet agents, he was given instructions as to how he might contact or be contacted by Soviet agents in the United States. [fol. 865] Rhodes then testified that after he returned to this country he did not again have contact with agents of the Soviet Government. In December 1953 he was transferred from San Luis Obispo to Fort Monmouth, New Jersey, then transferred to Fort Huachaca, Arizona, and then back to

Fort Monmouth. During his second tour of duty at Fort Monmouth, Rhodes and his family lived in Eatontown, a town which is almost contiguous with Red Bank.

He also testified that during 1955 his father and his sister, Arlene Brown,¹³ lived in Howard, Colorado, a town near Salida, Colorado.¹⁴ Counsel for the appellant strenu-

¹³ Arlene Brown was called as a witness by the Government. She testified that in the spring of 1955 she received a telephone call concerning her brother from a man who spoke with a very heavy accent.

¹⁴ Prior to the trial Rhodes had given statements concerning his activities in Moscow to the F. B. I. and to the Department of the Army. Both of these statements, in their entirety, were made available by the Government to counsel for the defense. Examination of the statements by defense counsel revealed a discrepancy as to one important particular in the two statements. However, as this discrepancy related to a matter which the Department of the Army considered classified information, Rhodes was not questioned about it on either direct or cross-examination. Instead, appellant's counsel and counsel for the Government stipulated that the trial judge should inform the jury that a contradiction as to this one particular existed between the two statements. Accordingly, prior to cross-examination of Rhodes, the judge stated to the jury:

"Members of the jury, as you probably realize, when we took a recess it was for the purpose of a consultation between the Court, counsel for both sides, and other representatives of the United States Government.

As the result of that conference, it was brought to light that the witness Rhodes gave certain statements to the Army and to the F. B. I. during the month of June, 1957 and, I think, July and perhaps later.

Those statements were the basis of the consultation.

At the end of the discussion, which was quite informal, the United States concedes with respect to one item referred to in those statements this witness has made conflicting statements.

The subject matter involved was not brought out on his direct testimony because, in the opinion of the Government, it would not have been in the interests of national security for that subject to have been inquired into.

The conflict pertained to his version of his activities in Moscow, and an important incident which there occurred.

Both counsel have agreed that since this concession is before the jury, namely the concession that the witness has made

[fol. 866] ously objected to Rhodes' testimony. At the trial, and now on appeal, they contend that his testimony was not relevant to any of the issues raised during the trial and that insofar as it contained a recitation of crimes in which the appellant was never shown to have participated, it was highly prejudicial to appellant. The Government, on the other hand, contends that Rhodes' testimony was admissible as tending to corroborate Hayhanen's testimony concerning the efforts made by him and Abel to locate Rhodes. It was upon this theory that the trial judge admitted the testimony.

The issue is not so much one of law as it is one of logic. The question to be answered is whether as a result of Rhodes' testimony we, or the jury, know more about the circumstances of this case than would have been known if the testimony had been excluded. We think it clear that the answer to that question must be stated in the affirmative. Hence we conclude that Rhodes was properly permitted to testify.

To be sure, Abel was not chargeable with responsibility for Rhodes' activities while the latter was in Moscow; but [fol. 867] the fact that Rhodes had engaged in those activities, that he had notified Soviet agents of his transfer to the United States, and that arrangements were made whereby Rhodes and Soviet agents could contact one another in this country, lent credence to the testimony of Hayhanen that he and Abel, both agents of the Soviet Government, had received instructions to locate Rhodes and that they had made efforts to do so. Phrased somewhat differently, the effect of Rhodes' testimony was to better

conflicting statements, the witness has been to this extent discredited. Such is the purpose of cross-examination.

Counsel for both sides have agreed that no useful purpose would be served by pursuing the subject further."

The statements made by Rhodes to the Army and to the F. B. I. have been made available to this court, in their entirety, and have been examined by us. In our opinion, the trial judge's statement to the jury accurately reflected the substance of the discrepancy between the two statements, and the rights of the appellant were in no way prejudiced by the withholding from the jury of the subject matter of this discrepancy.

enable the jury to pass upon the credibility of a material portion of the testimony of Hayhanen. The jury determination as to whether Hayhanen spoke truthfully or falsely about the instructions he had received and the efforts made by him and Abel to locate Rhodes was materially aided by testimony tending to show that a strong motive existed to locate the latter. Rhodes' testimony provided that motive.

It should be borne in mind that this is not a case in which there has been an attempt to create an aura of credibility with respect to the testimony of an accomplice witness by introducing independent corroborative evidence of minor matters to which the accomplice testified. See *People v. Nitzberg*, 287 N. Y. 193, 38 N. E. 2d 490 (1941); *Commonwealth v. Holmes*, 127 Mass. 424 (1879); but cf. *Hoback v. United States*, 296 Fed. 5 (4 Cir. 1924), cert. denied, 265 U. S. 594; *United States v. Biebusch*, 1 Fed. 213 (E. D. Mo. 1880); *Arcock v. State*, 62 Ga. App. 812, 10 S. E. 2d 84 (1940); *Ettinger v. Commonwealth*, 98 Pa. 338 (1881). Rhodes' testimony tended to prove the truth of Hayhanen's testimony, not because it tended to confirm some of the details of the latter, but because the circumstances which Rhodes related made it more likely that Rhodes was, as Hayhanen had testified, being sought by foreign espionage agents.

[fol. 868] IV. *Alleged Deprivation of a Fair Trial.*

The final ground for reversal urged by the appellant is that during the trial a variety of minor errors occurred which, cumulatively, had the effect of depriving him of a fair trial. A careful perusal of the record indicates that this contention is unfounded. Although occasional error did occur at the trial—indeed, it would be somewhat surprising not to find minor error in the course of a trial lasting approximately two weeks—we cannot find that the appellant was injured thereby.

The most important of these errors complained of by the appellant is the refusal of the trial judge to grant two motions, one made prior to trial and one at the close of the Government's evidence, to strike as surplusage a recital in the tenth paragraph of both the first and second

counts of the indictment that it was a part of the conspiracy charged that Abel and his co-conspirators "would engage in acts of sabotage against the United States." See Rule 7(d) Fed. Rules Crim. Proc. Even though we agree with the appellant that the reference to sabotage was surplusage, we are unable to see how that reference could have been prejudicial to his interests. As appellant points out, "sabotage," unlike the crime of "espionage" charged in the indictment, connotes violence and destruction and hence might tend to inflame the jury; but there was no testimony in the case concerning sabotage or a conspiracy to commit sabotage, and the jury was carefully instructed by the trial judge that the indictment was not evidence and was not to be considered by them as evidence. Under these circumstances, we think that the failure of the trial judge to grant the motions to strike was such insubstantial error that it falls within the injunction of Rule 52(a), Fed. Rules Crim. Proc. Cf. *Catrino v. United States*, 176 F. 2d 884 (9 Cir. 1949).

[fol. 869] The appellant also alleges that a series of errors occurred during the examination of witnesses—particularly during the examination of Hayhanen. Thus, it is contended that Hayhanen was continuously led by the prosecutor, that the conversations with Abel to which Hayhanen testified were needlessly vague, and that a variety of improper questions were put to him. No purpose would be served by a detailed discussion of these alleged improprieties. As to some we do not find that any error was committed; others were matters within the discretion of the trial judge, who, in our opinion, did not abuse that discretion; and as to the remainder we think that the alleged errors were not so prejudicial as to require a new trial in this case where the "record fairly shrieks the guilt" of the accused. *Lutwak v. United States*, 344 U. S. 604, 619 (1953).

Subsequent to his indictment the appellant requested the district court to appoint counsel for him, to be recommended by the local bar association. In accordance with this request, the district court appointed James B. Donovan as chief defense counsel. Arnold Guy Fraiman was subsequently appointed as associate defense counsel. Both at the trial

and on this appeal these attorneys, together with Thomas M. Debevoise, II, who assisted them, have represented the appellant with rare ability and in the highest tradition of their profession. We are truly grateful to them for the services which they have rendered.

Affirmed.

[fol. 870]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

RUDOLF IVANOVICH ABEL, a/k/a "Mark" & a/k/a Martin
Collins & Emil R. Goldfus, Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of New York

JUDGMENT—July 11, 1958

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 872] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 874]

SUPREME COURT OF THE UNITED STATES

No. 263, October Term, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus, Petitioner,

VS.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to questions 1 and 2 presented by the petition for the writ which read as follows:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?"

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 867]

SUPREME COURT OF THE UNITED STATES

No. 263, October Term, 1958

RUDOLPH IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER SETTING CASE FOR REARGUMENT—March 23, 1959

It is ordered that this case be set for reargument on October 12, 1959, at the head of the calendar for that date. Upon reargument counsel are requested to discuss in their further briefs and oral arguments, in addition to other issues, the following questions:

1. Whether under the laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody, and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham were valid under the laws and Constitution of the United States.

3. Whether on the record before us the issues involved in Questions "1(a)", "1(b)", and "2" are properly before the Court.

Upon reargument each side will be allowed one and one-half hours for oral argument.

March 23, 1959

FILE COPY

PETITION FOR CERTIORARI

No. ...

2

Office - Supreme Court, U.S.

FILED

AUG 8 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,
Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

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August 8, 1958

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958.

No.

RUDOLF IVANOVICH ABEL, also known as "Mark" and also
known as Martin Collins and Emil-R. Goldfus,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review
the judgment of the United States Court of Appeals for the
Second Circuit entered in the above-entitled case on July
11, 1958.

Citations to Opinions Below.

The opinion of the United States District Court for the
Eastern District of New York (239)* is reported at 155 F.
Supp. 8. The opinion of the Court of Appeals (Appendix
"A", This Petition, pages 23 to 53) is not yet reported.

* Parenthetical page references are to the separately printed
Joint Appendix in the court below, except as otherwise indicated.

Jurisdiction.

The judgment of the Court of Appeals was dated and entered on July 11, 1958 (Appendix "B", This Petition, page 54). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?

3. Whether a conviction for conspiracy to gather and transmit "defense information" in violation of 18 U. S. C. 793 and 794 can be upheld when (a) there is no evidence of conspiracy to gather or transmit classified information, or other materials not generally available to the public, and (b) there is no evidence that the defendant possessed knowledge of this essential element of the substantive offense which he is accused of conspiring to commit?

4. Whether a conviction for conspiracy can be upheld when the trial court admitted as evidence, to corroborate

an accomplice, the testimony of a witness with respect to heinous crimes unrelated to the alleged conspiracy and unconnected with the defendant?

5. Whether a defendant is deprived of a fair trial and due process of law when, after repeated timely motions, the trial court in a prosecution for conspiracy to commit espionage permits the jury to consider allegations of sabotage although, as held by the Circuit Court in this case, such allegations of sabotage are surplusage and there is "no testimony in the case concerning sabotage or a conspiracy to commit sabotage" (Appendix "A", p. 53)?

6. Whether in other material respects the conduct of the trial court in this case deprived petitioner of a fair trial and due process of law?

Constitutional and Statutory Provisions.

The constitutional and statutory provisions involved are Amendments IV and V to the Constitution of the United States; 18 U. S. C. 794 ("Gathering or delivering defense information to aid a foreign government"); 18 U. S. C. 793 ("Gathering, transmitting or losing defense information"); 18 U. S. C. 951 ("Agents of foreign governments"); and 18 U. S. C. 371 ("Conspiring"). All are printed in Appendix "C" to this petition, *infra*, pp. 55 to 60.

Statement.

Appellant was indicted on August 7, 1957 in the Eastern District of New York upon charges of conspiring to commit espionage on behalf of Soviet Russia. Three separate counts charged conspiracies to violate 18 U. S. C. 794, 793 and 951.

4

Following a jury trial before Hon. Mortimer W. Byers, D.J., petitioner, the only defendant, was convicted on all counts. On November 15, 1957 he was sentenced to thirty years imprisonment and fined \$3,000 (829, 834). The Court of Appeals for the Second Circuit affirmed his conviction on July 11, 1958.

The Facts.

All facts in the following narrative are taken exclusively from statements by U. S. Government officials or witnesses.

In early May, 1957 one Reino Hayhanen informed the American Embassy in Paris that since 1952 he had been acting in the United States as an intelligence agent for the U. S. S. R. and that since 1954 he had assisted here in Soviet espionage one "Mark", whose true name he did not know but whom he identified at the trial as the petitioner Rudolf Ivanovich Abel (439-444, 289, 377, 488). We may note that in June, 1957 Hayhanen gave the F. B. I. in New York a handwritten statement flatly denying that he ever had engaged in any espionage activity in the United States (478, 500). At the trial below, Hayhanen was thoroughly discredited (477-500, 771-776). His evidence, as the court instructed the jury, was the only testimony with reference to the three conspiracies charged in the indictment (810-811).

Based upon Hayhanen's original story, F. B. I. agents in May, 1957 commenced an intensive investigation of the alleged espionage activities of the petitioner, shadowing him, watching his studio in Brooklyn and occupying the hotel room next to his at the Hotel Latham in Manhattan (56, 137-138, 644-657). Further, acting upon Hayhanen's information, the agents uncovered testimony and exhibits

which were later introduced in evidence at the petitioner's trial for conspiring to commit espionage.

On approximately June 13, 1957 the F. B. I. informed the Immigration Service that the petitioner, who was known to them as "Martin Collins" or "Emil Goldfus", was believed to be a foreign espionage agent illegally in this country (198-199). On June 20, 1957 at a conference in F. B. I. headquarters, Washington, D. C., upon the basis of an F. B. I. report (160-164), the Immigration Service agreed to pick up Abel on a warrant for deportation. Immigration Service agents that same day were instructed to take the warrant to New York for the signature of their District Director there and then to communicate with the F. B. I. in New York (93-95, 164-165). This they proceeded to do, spending the night at F. B. I. headquarters in New York (100).

At approximately 7:00 a.m. on the morning of June 21, 1957 F. B. I. and Immigration agents, acting in unison according to a pre-arranged plan (98-101, 136-138, 165), surrounded petitioner's room in the Hotel Latham. Two F. B. I. agents knocked on the door and "pushed" into the room (175). Shortly thereafter, a third F. B. I. agent entered the room (177). They explained the internal security jurisdiction of the F. B. I. (See Reasons Why the Writ Should Be Granted, *infra*, pages 13 to 15) and stated that their purpose in questioning him was concerning such matters (179-180). They said: "Colonel, we have received information concerning your involvement in espionage" (183-184). For approximately a half-hour they questioned Abel about his activities in the United States.

The F. B. I. agents' instructions were "to solicit the petitioner's cooperation" (175). If he did cooperate; they were to " . . . call our immediate superior at the New York Office of the Federal Bureau of Investigation and

relate to him the degree of cooperation being exhibited . . . " (184-185).

The F. B. I. agents followed their instructions. Abel was warned that if he failed to cooperate "he would be placed under arrest prior to leaving the room" (183). He was not warned of his constitutional rights (185-187).

Shortly after 7:30 a. m. the F. B. I. agents recognized the futility of further discussion at that time. One left the room and motioned to the waiting Immigration Officers to take Abel into custody (139-140, 189-190). The Immigration Officers did so and then proceeded, in the presence of the F. B. I. agents (54, 59, 142, 190) to search all Abel's personal effects in the room, including his clothing, dresser drawers, suitcases, etc. They found no weapons or "evidence of alienage" (142, 150) but seized over 200 items belongi to Abel (37-45). A list of the items seized by Immigration agents at that time which were later introduced as evidence at the espionage trial, is set forth in Appendix "D" to this Petition.

Subsequently that day the over 200 items seized by Immigration Officers "were displayed to Special Agents of the Federal Bureau of Investigation" (54) and then were more thoroughly searched at Immigration Headquarters (59-60, 669). On the basis of some of the items then seized by Immigration Agents but which were not used at the trial, F. B. I. agents obtained two search warrants (47-55, 247-274) relating to petitioner's Brooklyn studio. There more than 300 other items were seized, some of which were used at the trial as set forth in Appendix "D" hereto.

After the Immigration Officers arrested Abel at the Hotel Latham, an F. B. I. agent took money from him and "checked him out" down at the hotel desk (144, 703). His rent so paid entitled him to possession of the room until 3:00 p. m. that afternoon (660). However, shortly after

Abel was removed from the hotel, by a back door in handcuffs, F. B. I. agents with permission from the hotel owner conducted another search of Abel's room. The F. B. I. at that time seized over 30 additional items (46, 693-695), 5 of which were introduced as Government exhibits 87, 88, 97, 98, 98A at Abel's espionage trial. The Government has contended that these items were not illegally seized because, by checking out of the room, Abel had "abandoned" them.

After fingerprinting at Immigration Headquarters on June 21, 1957, the petitioner was placed on a special plane in which he was taken to an Immigration Service detention facility in McAllen, Texas (60). Immigration and F. B. I. agents immediately began to interrogate Abel. At the end of three days, petitioner stated that he was a Russian citizen illegally in this country and was given a deportation hearing by Immigration (61). At his own election he was ordered deported to the U. S. S. R. on June 27, 1957 (689-693). Thereafter, Abel states and the Government does not deny, the F. B. I. interrogation continued for several weeks and although he was offered a United States Government job and other inducements, he continued to refuse to "cooperate" (31).

On August 7, 1957, for the first time, a criminal warrant for Abel's arrest on espionage charges was issued upon an indictment returned that day and Abel for the first time was taken before a court. He was then brought back to New York (1).

The Trial.

Prior to trial the petitioner moved pursuant to Rule 41(e), Federal Rules of Criminal Procedure, for the return and suppression for use as evidence, of all items seized from

his room at the Hotel Latham on June 21, 1957 (20-52). A hearing was held on this motion (79-238) which was denied (239-246).

Also prior to trial Abel moved to strike from the indictment charging him with conspiracy to commit espionage all allegations regarding the separate crime of sabotage, on the grounds that such allegations were prejudicial surplusage, pursuant to Rule 7(d), Federal Rules of Criminal Procedure (275-279). This motion was also denied (280).

At the trial evidence obtained as a result of the Latham search was introduced (see Appendix "D"). There was no evidence of even an attempt to steal information of any sort and specifically none in relation to information not generally available to the public. Principal witnesses for the prosecution were the alleged co-conspirator Hayhanen and, for the purpose of corroboration (783, 813) one Sergeant Rhodes of the United States Army. Although the latter admitted not knowing anyone in the alleged conspiracies (637), and although it is not claimed that he was a conspirator with the petitioner, he was permitted to testify to selling information about United States Government activities to uniformed Russians while in Moscow during 1951, 1952 and 1953 (602-621, 637-643).

Prior to Sergeant Rhodes' testimony the petitioner asked the Court to require an offer of proof from the Government on the grounds that his testimony would be irrelevant and so highly prejudicial to the petitioner that even if later stricken from the record it could not help but do irreparable prejudice (602-603). This motion was denied, as was also a subsequent motion to strike Sergeant Rhodes' testimony. This testimony was referred to at length in the Government's closing argument to the jury (783-786). Its importance to the jury is demonstrated by the fact that of the two Government exhibits it requested during its

deliberation, one was concerned solely with Sergeant Rhodes (833).

The Circuit Court of Appeals in upholding the admissibility of Sergeant Rhodes' testimony stated that: "To be sure, Abel was not chargeable with responsibility for Rhodes' activities while the latter was in Moscow; but the fact that Rhodes had engaged in those activities, * * * lent credence to the testimony of Hayhanen * * *" (Appendix "A", p. 51). That Court concluded its discussion of this testimony by stating that while Rhodes' testimony did not confirm details of Hayhanen's testimony (the two witnesses had had no contact with one another or even mutual contacts) it did make certain portions of Hayhanen's testimony "more likely." (Appendix "A", p. 52).

During the course of the trial, petitioner asserts, many other errors were committed by the Court's continually permitting leading questions, improper questions, vague testimony; by the Court's asking improper questions and making improper remarks and by the way in which the Government asked witnesses to identify the petitioner. The petitioner contends that, while the Court of Appeals found that many of such errors "were matters within the discretion of the trial judge, who, in our opinion, did not abuse that discretion; and as to the remainder we think that the alleged errors were not so prejudicial as to require a new trial * * *" (Appendix "A", p. 53), the cumulative effect of such constant errors throughout the proceeding was to create a climate in which it was impossible that petitioner be afforded a fair trial.

Reasons Why Writ Should be Granted.

This case presents legal issues of significant import under the Constitution and laws of the United States,

affecting the individual rights and liberties of all in the nation.

1. The court below has erroneously decided important questions of federal law which have not been, but should be, settled by this Court.

A. Search and Seizure Based on Administrative Warrant.

The court below has decided that solely upon the basis of an administrative Immigration Service warrant for deportation, Federal police may conduct an unlimited search of a suspect's home and seize all his effects.

This Court has never decided this question. The court below so stated (Appendix "A", p. 37) and the District Court declared that this is "a matter of first impression" (243).

The question is of fundamental importance, with respect to the protection afforded by the Fourth and Fifth Amendments, to all who are aliens or who are believed by Federal authorities to be aliens. *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952); *Robinson v. Richardson*, 13 Gray 454 (Mass. 1856), cited with approval in *Boyd v. United States*, 142 U. S. 450, 458 (1892); see also *Colyer v. Skeffington*, 265 Fed. 17, 26 (Mass. 1920), rev. on other grounds, 277 Fed. 129 (1st Cir. 1922). Compare facts in instant case with those in *Giordénello v. United States*, U. S., 2 L. ed. 2d 1503, 78 Sup. Ct. (1958), not yet officially reported.

B. Conspiring to Obtain or Transmit "Defense Information".

The court below has decided that a conviction for conspiring to obtain or transmit "defense information" may

be upheld although there is no evidence that the specific information involved is classified or otherwise not generally available to the public.

This Court has never decided this question. The Second Circuit previously has held that an espionage conspiracy conviction must be set aside when the evidence proved the transmission, by devious means, of information affecting the national defense but there was no showing that such information was classified or otherwise unavailable to the general public. *United States v. Heine*, 151 F. 2d 813 (2nd Cir. 1945), cert. den. 328 U. S. 833 (1946). Cf. *Gorin v. United States*, 312 U. S. 19 (1941) and *United States v. Rosenberg*, 195 F. 2d 583, 591 (2nd Cir. 1952), cert. den. 344 U. S. 838 (1952).

In the case at bar, the court below in its opinion first reasons that it was sufficient evidence for a co-conspirator, in response to leading questions, to recite the legal conclusion that he believed he was seeking "national security information * * * military information or atomic secrets." This, notwithstanding the fact that the witness had previously testified that he was told in Moscow that the kind of information (overt or secret) he should secure would depend upon what agents he obtained here after his arrival—and it was never shown that he ever acquired any agents in this country.

The court below further reasons that its decision is supported by evidence of devious methods of communication among co-conspirators, since "an inference as to their purpose is properly drawn from the methods which they employed." Yet see the devious methods employed by the co-conspirators in *United States v. Heine*, *supra*. As to the Government's failure to prove petitioner's knowledge of this essential element of the substantive offense, see *United States v. Crimmins*, 123 F. 2d 271 (2nd Cir. 1941).

C. Evidence of Unrelated Crimes Committed by a Non-Conspirator.

The court below has decided that in a federal prosecution for conspiracy the trial court may admit as evidence, in order to corroborate the testimony of an accomplice, the testimony of another witness with respect to heinous crimes unrelated to the alleged conspiracy and unconnected with the defendant.

This Court has never decided this question. The New York Court of Appeals has clearly held such testimony to be inadmissible as a matter not only of evidence but of simple logic. *People v. Nitzberg*, 287 N. Y. 183 (1941). The court below, while granting that a rule of logic should govern, declares that the testimony should be admitted because as a result "we or the jury, know more about the circumstances of this case than would have been known if the testimony had been excluded" (Appendix "A", p. 51). The question for this Court accordingly is whether such a rule is hereafter to govern the admissibility of evidence in a federal prosecution for conspiracy and whether a person convicted upon such evidence has been accorded due process of law under our judicial system.

D. Prejudicial Surplusage Permitted to be Considered by Jury.

The court below has decided that it is not reversible error when, after repeated timely motions, the trial court in a prosecution for conspiracy to commit espionage permitted the jury to consider allegations of the independent and violent crime of sabotage although, as held by the Circuit Court in its opinion, such allegations of sabotage were surplusage and "there was no testimony in the case concerning sabotage or a conspiracy to commit sabotage." (Appendix "A", p. 53).

This Court has never decided this question, or, in general, the effect of Rule 7(d) of the Federal Rules of Criminal Procedure. However, see *United States v. Goedde*, 40 F. Supp. 523 (E. D. Ill. 1941); *Meller v. United States*, 160 F. 2d 757 (8th Cir. 1947); *Beck v. United States*, 33 F. 2d 107 (8th Cir. 1929); *United States v. Hood*, 290 F. 639 (5th Cir. 1953).

2. The Court Below Has Decided Important Federal Questions in Direct Conflict With Applicable Decisions of This Court.

A. Lack of "Good Faith" in Search.

Petitioner submits that the evidence is overwhelming that the primary objective of the Department of Justice, in its questioning, search and seizure in Room 839 of the Hotel Latham on June 21, 1957 was to deal with a suspected espionage agent of a foreign power and not to detain an alien unlawfully in the United States. If petitioner's contention is correct, it would seem clear that the requisite "good faith" of the arresting officers is lacking and the search must be set aside as violating the Fourth and Fifth Amendments, under the doctrine agreed upon by both the majority and the minority of this Court in *Harris v. United States*, 331 U. S. 145 (1947). See also *United States v. Valente*, 155 F. Supp. 577 (D. C. Mass. 1957).

A summary of the pertinent facts is set forth in the Statement contained in this petition. However, in order to understand what occurred in Room 839 of the Hotel Latham on the morning of June 21, 1957 it is essential to bear in mind that the Federal Bureau of Investigation has two distinct functions; first, it is a law enforcement or police agency and second, it is a component part of our national intelligence forces dealing with internal security and counter-espionage in the United States. Compare 5 U. S. C. 299, 300 and 50 U. S. C. 403 (a)(c).

Its internal security function is recognized as such by the F. B. I. (179, 180, 195) and its procedures are governed accordingly. In the virtually official "The F. B. I. Story" by Whitehead (Random House, N. Y. 1956) the Foreword is by J. Edgar Hoover, Director of the F. B. I., who states therein that (a) the F. B. I. has "complete confidence in his (the author's) integrity, ability and objectivity", and (b) "the facts reported are supported by the Bureau's record." In "The F. B. I. Story" the author states (63-64):

"The FBI conducts two types of security investigations—one to uncover admissible evidence to be used in the prosecution of an individual or group in federal court, the other for intelligence purposes only. The intelligence investigation is intended to identify and determine the activities of individuals who are potentially dangerous to the nation's security, thereby supplying information on which to base preventive or counterespionage action. Often clandestine methods are necessary to uncover clandestine operations, as for example, obtaining an espionage agent's diary or secret papers. The evidence in the diary may be inadmissible in federal court, but it may contain information which would enable the United States to protect itself at a later date. This is in contrast to a case where legal evidence, admissible in court, has to be obtained to convict the espionage agent of violating the laws of the United States."

It has been our contention that such a "clandestine operation" is a precise description of what the Department of Justice attempted in this case. We have not criticized their calculated gamble to grab Abel and his effects, keep his seizure secret as long as possible, and try to persuade him to aid the United States. We stated below that from a counter-espionage viewpoint, the decision was prospec-

tively sound (25). But we maintain that the Department of Justice, having elected to gamble that Abel would "cooperate" and then having lost, cannot subsequently seek to reverse its steps, prosecute Abel on evidence "inadmissible in federal court" and pay lip service to due process of law.

The point was over-ruled by the court below, the District Judge commenting during the hearing: "I think it is the job of the F. B. I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function" (131). We respectfully submit that unless this Court is to over-rule the decision in *Harris v. United States*, *supra*, the search in the case at bar cannot be upheld under the plain language of the Fourth and Fifth Amendments.

B. Evidence Seized Unrelated to Warrant.

Annexed as Exhibit "D" to this petition is a list of the exhibits and testimony introduced at the trial which were illegally seized, or obtained by leads from items illegally seized, from petitioner.

Assuming, *arguendo*, that the search in the instant case was valid, the seizure of petitioner's belongings, with a few possible exceptions hereinafter noted, was unreasonable, because the items seized bore no relation to the warrant pursuant to which petitioner was arrested. It has been established by this Court that the objects sought for in a search incidental to a valid arrest must be either (1) instrumentalities and means by which the crime charged in the warrant is committed; (2) the fruits of such crime; (3) weapons by which escape of the person arrested might be effected; or (4) property the possession of which is a crime. *Harris v. United States*, *supra*; *Agnello v. United States*, 269 U. S. 20 (1925).

The warrant in the instant case charged that petitioner was subject to deportation because he was an alien illegally in the United States. The search was made incidental to petitioner's arrest on this warrant (which we are assuming, for the sake of argument, was a valid search). Assuming that the immigration warrant charges the commission of a crime, it conceivably might be argued that the following items seized in petitioner's room were properly seized as instrumentalities by which the "crime" charged in the warrant was committed:

(1) New York State birth certificate #33318, in the name of Emil R. Goldfus;

(2) New York City birth certificate issued in the name of Martin Collins; and

(3) An international certificate of vaccination issued in the name of Martin Collins.

All other items seized from petitioner's room were neither the instrumentalities by which the "crime" charged in the warrant was committed; the fruits of such "crime"; weapons to aid his escape; or property the possession of which is a crime. In fact, they had no relation whatsoever to the matter in the Immigration warrant. Their seizure was therefore unreasonable and they should not have been used as evidence. *Harris v. United States*, 331 U. S. 145 (1947); *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931); *United States v. Valente*, 155 F. Supp. 577 (D. C. Mass. 1957).

3. The court below has so far sanctioned a departure from the Accepted Course of Judicial Proceedings as to call for an exercise of this Court's Power of Supervision.

It is the contention of the petitioner that during the course of the proceedings in the District Court a variety

of errors were committed which, cumulatively, shifted the burden of proof to the defendant and deprived him of a fair trial. Such a cumulative effect can constitute grounds for reversal even though a particular error may in itself be "harmless error" or not amount to an abuse of the trial court's discretion. *Calvaresi v. United States*, 348 U. S. 961 (1955) reversing 216 F. 2d 891 (10th Cir. 1954).

A. Examination of Hayhanen.

We have noted that the sole testimony in the case with reference to the conspiracy was the testimony of Hayhanen (810-811). A proper direct examination of this witness accordingly was necessary for a fair trial.

The original defense objection to leading the witness was over-ruled as "not harmful leading" (286) as was the second one some time later (296). The prosecutor took the second occasion to remark that the material he was covering was really just background (296). Yet it appears that prior to that time (295) the following series of questions which constitute the only testimony in the record concerning a co-conspirator named in the indictment had taken place:

"Q. Before you were transferred to Esthonia and on this first meeting, did you meet a Colonel Korotkov? A. Yes, I met.

"Q. Will you tell us the circumstances—

"A. Korotkov was the assistant boss of P. G. O.

"Q. And you met him at the time that you made this trip to Moscow when you were recalled back? A. Yes."

The defendant moved at the end of the Government's case to strike Korotkov as a co-conspirator for failure of

proof, which was denied (757-8). And on this basis the jury was told (799) that the Grand Jury accused the defendant of conspiring with this high Russian official.

The 325 pages of Hayhanen's direct testimony are filled with highly prejudicial leading questions. The sole testimony in the case relating to national defense information was extracted from the witness in this way (313, 314) and misquoted back to the witness likewise (315, line 20). Twice during the witness' recital of his instructions in Moscow in 1952, which as pointed out above was crucial testimony for the Government, the Court sustained defense objections to leading (312, 315), but the prosecutor continued to lead with the following explanation: "I might say this, your Honor, the only reason I use that type of question is certainly not to suggest the tenor of the answer but merely a topic. We have a witness who is not as conversant in the English language as the rest of us" (316). Whether Hayhanen, a confessed Russian intelligence agent trained in the English language, could understand or not, the prosecutor placed an impossible burden on the defendant if he was not to appear to the jury to be obstructing the trial by objecting to every question.

While a reading by the Court of the Hayhanen examination will show that the examples of leading questions are too numerous to list, the attention of the Court is directed to the following as illustrative of a consistent pattern (290, 293, 295, 296, 301, 305, 312, 348, 351, 356, 357, 368, 370, 374, 380, 399, 400, 403, 407, 409, 410, 411, 412, 413, 416, 417, 419, 426, 427, 430, 435, 437, 445, 459, 465).

During Hayhanen's testimony the prosecutor often neglected to make any attempt to have the witness tell when, where, or with whom conversations and instructions about which he was testifying occurred. The time, place

and individuals involved were of course necessary to determine the relevance of his conversations and instructions and also to enable the defendant to meet the testimony. Objections on this basis were met with the remarks: "Don't you think you and I could both be patient?" (354); "I could only try my own case, your Honor" (376); "You know what cross examination is" (380); "Must we know it now or when you cross-examine?" (394). See also 330; 345. Once when such an objection was taken to a question and answer which began, "I was told * * *", the Court ~~ruled~~, "That is a fact, not conversation" (297). Yet the fixing of an important date would result in so vague a statement as (361):

"Q. Was it the summer, the fall, or— A. It was fall because it was raining, and I believe it was fall. It was raining that night, and I believe it was fall, 1953. Or maybe it was in—could be even spring, 1954, because in springtime, there is raining too."

During Hayhanen's examination when the prosecutor did attempt to fix the approximate date of an event, he would do so by questions relating to a trip which the defendant allegedly took to Moscow. When he forgot to phrase his question in such a manner and the witness answered, "It was springtime in 1955", the prosecutor corrected him. "Q. Just before Mark went to Moscow? A. Yes * * *" (414). When defense counsel finally said: "Pardon me, your Honor, couldn't we have any references to the normal calendar years and months rather than repeating over and over again an identification prior to a trip to Moscow which has not been proven?", the prosecutor replied, "If Mr. Donovan will tell me what difference it makes to him, I will be glad to do it" (415). To which the Court added "I would rather not do that, I am afraid he will make a speech" (*Id.*).

The direct examination of Hayhanen is filled with questions concerning the *reason* a witness did something, his *purpose* for so doing, and what he did *as a result* of something else. The Court did correct the prosecutor when he said, "I think the witness may testify as to his impression" (417) but thought it proper that the witness be asked on direct examination "Why" he did something (396-397).

The prosecutor asked the witness Hayhanen about certain conversations and acts with third parties after he had left the conspiracy. When the defense objected on the ground that the witness had left the conspiracy the Court, not being sure of that fact, allowed the questions (439 *et seq.*). The Government knew that Hayhanen had left the conspiracy but said nothing and continued the line of questioning (439-446, 515-522, 541-542).

B. Conduct of Trial.

The stock question repeatedly asked of the defendant was, "What harm does it do." When photographs were offered which were not accurate representations of what the witness saw (341), "What harm does the arm do in there?" When completely immaterial exhibits were introduced—Exhibits 40 and 41 (510-513), "I don't think it does any harm". When irrelevant testimony not binding on the defendant was introduced, "What harm is done?" (539) When exhibits for use in demonstrations were offered not for their contents but yet contained references to the case (589-590, 473), "Will it do any harm?"

The prosecutor had no hesitancy in calling on the defendant in front of the jury to stipulate testimony (363) or to admit the fact that he spoke Russian (479-480); he put facts in evidence himself (322, 319, 461) a good example being when the prosecutor testified in connection with Government Exhibit 100, "They are radio messages in code"

(750). So, too, in summation the prosecutor stated his personal conviction not only that Hayhanen had been corroborated but also that the Government had proved its case "beyond all possible doubt" (794).

The Court also propounded questions to defense counsel about the defendant: "Why do you think he put it in the basket? Or don't you care to answer" (724).

The same attitude prevailed with respect to identification of the defendant. "Would the defendant please stand so that Dr. Groopman could identify him?" (598) "Is that the individual who registered as Martin Collins (indicating)?" (657). "Will the defendant stand up so there will not be—we want it to be positive" (562).

The fact that the Government was permitted to introduce many immaterial and irrelevant exhibits [see in particular Exhibit 40 (509-511), Exhibit 41 (511-513), Exhibits 57, 58, and 59 (563-565, 655), Exhibit 69 (606-607) but also Exhibits 2 through 11, 13 through 17, 20 and 49 through 51] 94 of which were received in evidence, permitted the judge to charge the jury (814),

"* * * I think there is an even one hundred [exhibits] offered by the Government * * *."

However, when the appellant introduced the blowup of certain microfilms which the Government had identified as being in the defendant's possession, but had not offered, the Court did its best to cast suspicion on the nature of the exhibit (734-735). The Government objected to the admission of the microfilms "since they are personal letters which have nothing to do with the issues charged here in the indictment" (734). The Court then said (735):

"I understood your statement to be that seemingly these communications purport to be of a personal nature, is that it?

"Mr. Moroney: That is correct, sir:

"The Court: Your concession doesn't mean that you agree that that is all they are, or does it?

"Mr. Moroney: Oh no. I mean I think that is what they purport to be.

"The Court: Yes."

In his charge the Court made similar reference to the letters (814):

"Among those exhibits offered by the defendant are what both sides have argued to you are letters passing between the defendant and a member of his family. You may have been impressed by that argument. I am not saying whether you should have been or not, but I am calling your attention to the fact there is no evidence in this record as to the identity of a person who wrote any one of those letters or the person to whom any letter was addressed. So much of the argument, I think, was purely speculative."

Such was the climate of the trial. It is respectfully submitted that the cumulative effect of the foregoing was to shift the burden of proof to the defendant and deprive him of a fair trial and due process of law.

Conclusion.

Because for the foregoing reasons this case presents legal issues of significant import under the Constitution and laws of the United States, affecting the individual rights and liberties of all in the nation, petitioner respectfully requests this Court to issue its writ of certiorari to the United States Court of Appeals for the Second Circuit:

JAMES B. DONOVAN,
Counsel for Petitioner.

THOMAS M. DEBEVOISE, II,
Of Counsel.

August 8, 1958.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 331—October Term, 1957.

(Argued April 16, 1958

Decided July 11, 1958.)

Docket No. 24968

UNITED STATES OF AMERICA,

Appellee,

v.

RUDOLPH IVANOVICH ABEL, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus,

Appellant.

Before:

CLARK, Chief Judge, and LUMBARD and WATERMAN, Circuit Judges.

Appellant was convicted after a jury trial, Eastern District of New York, BYERS, J. He appeals from the denial of his pre-trial motion to suppress certain evidence, from the denial of a motion to strike alleged surplusage from the indictment, and from the conviction, alleging insufficient evidence to warrant submission of the case to the jury, and reversible error during the trial. Affirmed.

Appendix A.

WILLIAM F. TOMPKINS, Asst. Atty. Gen., Washington, D. C.; CORNELIUS W. WICKERSHAM, JR., U. S. Atty., E. D. N. Y., Brooklyn, N. Y.; Harold D. Koffsky, Kevin T. Maroney, Bruce J. Terris, Philip R. Monahan, James J. Featherstone, Attys., Dept. of Justice, Washington, D. C., for appellee.

JAMES B. DONOVAN, Brooklyn, N. Y. (Arnold G. Fraiman, New York City; Thomas M. Debevoise, II, Woodstock, Vt., of counsel), for appellant.

WATERMAN, Circuit Judge:

On August 7, 1957 a grand jury in the Eastern District of New York returned an indictment charging the appellant, Rudolph Ivanovich Abel; with having conspired to violate the espionage laws of the United States. Specifically, the indictment charged Abel with having conspired (1) to violate 18 U. S. C. §794(a) by communicating information concerning the national defense of the United States to the Union of Soviet Socialist Republics; (2) to receive and obtain material connected with the national defense of the United States for the purpose of transmitting such material to the Soviet government in violation of 18 U. S. C. §793(c); and (3) to violate 18 U. S. C. §951 by acting in the United States as an agent of a foreign government without prior notification thereof having been given to the Secretary of State. Prior to his trial upon this indictment, Abel moved pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for the return and suppression of certain evidence obtained by the Government as a result of an alleged unlawful search and seizure. The motion was heard by Judge Byers who, after a hearing, denied it in an opinion reported at 155 F. Supp. 8. The appellant was tried to a jury and convicted on each of the counts in the indictment. On November 15, 1957 he was sentenced to a total of thirty years imprisonment.

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The primary issue raised by this appeal is whether the Fourth Amendment prohibition of "unreasonable searches and seizures" was violated when government agents without a search warrant searched a hotel room occupied by Abel and seized certain articles which they found there. Also, we are called upon to determine whether there was sufficient evidence in the record to sustain a finding that Abel conspired to communicate to the Soviet Government information the transmission of which is prohibited by the espionage laws, see *United States v. Rosenberg*, 195 F. 2d 583 (2 Cir. 1952), *cert. denied*, 344 U. S. 838, *United States v. Heine*, 151 F. 2d 813 (2 Cir. 1945), *cert. denied*, 328 U. S. 833, and to determine whether the trial judge erred by receiving in evidence the testimony of a non-commissioned Army officer that he cooperated with the Soviet Government while serving in the American embassy in Moscow. And lastly, counsel for the appellant urge that a new trial is required because the cumulative effect of a variety of minor errors alleged to have occurred during the trial was such that the appellant did not have a fair trial.

In early May 1957 one Reino Hayhanen entered the American embassy in Paris and informed the officials there that he was an espionage agent in the United States for the Soviet government. Hayhanen was interrogated by the officials and later was flown back to the United States where he was questioned by agents of the Federal Bureau of Investigation. It was largely from the testimony of Hayhanen, though there was evidence from other sources as well, that the jury learned of the appellant's activities in the United States. Although there is no dispute about the sufficiency of the evidence to prove concerted activity between Abel and others on behalf of the Soviet government, a brief résumé of the record developed at the trial will be useful to indicate the scope of the conspiracy which was proved and the means by which its purposes were to be accomplished.

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Abel is a native of Russia, a citizen of the U. S. S. R., and a Colonel in the K. G. B., an espionage agency of the Soviet government. By his own admission he entered this country illegally in 1948 at an unknown point along the Canadian border. After this illegal entry the appellant, whose cryptonym is "Mark," adopted several aliases, one of which was Emil Robert Goldfus, the name of an infant who had died in New York City in 1903; while another was Martin Collins, a fictitious individual purportedly born in New York City. At the time of his arrest, on June 21, 1957, Abel was residing at the Hotel Latham in Manhattan and had rented an artist's studio in Brooklyn.

Hayhanen was also an agent of the K. G. B. and at the time of Abel's arrest held the rank of Lieutenant Colonel, though at the time he entered this country several years earlier he had been a Major. Hayhanen entered this country in 1952 with the passport and identity of one Eugene N. Maki, a native of the United States who had left this country for Russia in 1927.¹ Upon his arrival in New York City Hayhanen, according to his instructions, placed a tack in a designated sign in Central Park. This prearranged signal was the means by which he was to notify Soviet agents in New York that he had arrived safely and was not under surveillance:

Prior to the time that he had left the U. S. S. R. Hayhanen had received extensive training in the techniques of espionage. Thus, he was given instruction in photography with emphasis on making "microdots"² and "soft

¹ Hayhanen's testimony revealed the elaborate detail with which this illegal entry into the country had been planned. In 1949 he was smuggled into Finland by Soviet officials and remained there until 1952 when he embarked for the United States. During this time he assumed the identity of Maki and received funds with which to pay individuals in Finland so that they would be willing to state that he had lived in that country since 1943.

² "Microdot" is the term ordinarily used for photographic reduction of a document which is capable of being enlarged so as to be readable. Hayhanen also received instructions on this subject from Abel after he had met the latter in this country.

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film."³ He was also taught how to secrete messages in hollowed-out objects such as coins, bolts, screws and match books. In addition, he was given training in cryptography and assigned the cryptonym "Vik" which he was to use when communicating with other espionage agents. Hayhanen was also advised of the location of three "drops" in New York City. A "drop" is a hiding place used for the transmission of messages concealed in containers. Hayhanen was instructed to use these "drops," which were located in a wall on Jerome Avenue in the Bronx, a bridge in Central Park, and a lamp post in Fort Tryon Park,⁴ in communicating with his superiors.

Hayhanen had been sent to this country to serve as an assistant to an individual whom he then knew only as "Mark." Nevertheless, he did not meet Abel until the summer of 1954 when the two of them met in the men's smoking room at a theatre in Flushing. As far as appears, the only significance of this meeting was that Abel expressed some concern that Hayhanen obtain "cover work" which would not interfere with his espionage duties.⁵ Thereafter, Hayhanen saw Abel frequently, received his salary from him, and carried out several missions at his direction. On several occasions he saw Abel make use of "drops" which

³ "Soft film" is made from ordinary film by chemically treating the latter so as to remove its backing. The significance of "soft film" for espionage purposes is that it is pliable and capable of being folded to a small size.

⁴ The location of the "drops" was changed from time to time, but each was regularly assigned a number. Whenever Hayhanen had a communication for his superiors which he had concealed in a "drop," he would make a horizontal line in colored chalk on a slat in a designated fence in Central Park, the number of the slat, counting from the street side, corresponding to the number of the "drop" at which the message had been left.

⁵ "Cover work," as Hayhanen testified, is a means of visible support, necessary to avoid arousing suspicion concerning the activities of an agent.

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had been assigned to him and once was told by the appellant that the latter had several agents under him. Abel admitted to Hayhanen that he had received coded messages and on one occasion Hayhanen observed Abel attempting to receive the signals of a short-wave radio station. This attempt was unsuccessful. Also unsuccessful were attempts by Abel to find a suitable location for the establishment of a radio station which he had received instructions from Moscow to establish.

The record contains no indication that Abel or any of his colleagues were ever successful in transmitting to the Soviet Government any information pertaining to the national defense, but as the legality of a conspiracy is not to be judged by its success, the failure to show success is of no relevance, *United States v. R' inowich*, 238 U. S. 78 (1915); *United States v. Morello*, 250 F. 2d 631 (2 Cir. 1957). Considerable evidence is contained in the record establishing a continuous activity by the appellant on behalf of the Soviet government. This evidence need not be considered in detail; it will be sufficient to describe a particular episode which is relevant to issues raised by Abel on this appeal.

Sometime between July and December 1954 Abel received instructions from Moscow to locate a Soviet agent named Roy Rhodes, whose cryptonym was "Quebec." The instructions stated that Rhodes' wife owned several garages in Red Bank, New Jersey, but when, in late 1954, Abel and Hayhanen went to Red Bank they were unable to locate Rhodes. Abel instructed Hayhanen that in the latter's next message to Moscow he should request additional information about Rhodes. Hayhanen received a reply stating that Rhodes' family lived in Colorado and by some means not apparent from the record he and Abel were able to determine that the family lived in the town of Salida. Abel instructed Hayhanen to take a trip to Salida. Prior to the time that Hayhanen left, he and Abel went to the Central Library in Manhattan and obtained the name and

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telephone number of Rhodes' father. Hayhanen called this number when he arrived in Salida, stated that his name was Mike and that he would like to contact Rhodes. The party on the other end of the line, subsequently identified as Arlene Brown, a sister of Rhodes, informed Hayhanen that Rhodes was living in Tucson, Arizona. Hayhanen returned to New York and reported to Abel. Though there was some discussion as to whether Hayhanen should go to Tucson, Abel finally decided against it.

A discussion of Rhodes' role in the Soviet espionage system may be deferred until that portion of the opinion which deals with the admissibility of his testimony at the trial below. It is sufficient at this point to note the reason why Abel and his colleagues were so anxious to locate Rhodes. In the words of the witness Hayhanen:

"He [Abel] said that Quebec could be a good agent because he is—some of his relatives are working on—and he—on military lands.

"He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was."

In the summer of 1955 the appellant took a trip to the U. S. S. R. He and Hayhanen did not meet again until the following summer. At that meeting and during the next few months, arrangements were made for Hayhanen to travel to Russia on leave. Hayhanen left New York aboard the *Liberté* on April 24, 1957. Shortly after arriving in Paris, he notified other Soviet agents, by prearranged signal, that he had arrived safely and that he was proceeding to West Berlin. Instead of proceeding with this plan, he went to the American embassy where he informed the officials of his activities.

As a result of these disclosures agents of the F. B. I. began an intensive investigation of the appellant—an investigation which led to his arrest on June 21, 1957 by agents of the Immigration and Naturalization Service.

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I. Search and Seizure

The search and seizure issue raised by the appellant involves three separate and distinct questions: (1) whether agents of the Immigration and Naturalization Service, when making a valid arrest pursuant to a deportation arrest warrant,⁸ may, as an incident of the arrest, conduct a search of the hotel room in which the arrest is made without possessing a search warrant; (2) whether it was "clearly erroneous" for the distinguished trial judge to have found that the search conducted by the I. N. S. agents in the present case was conducted in good faith solely for the purpose of discovering weapons and evidence of alienage; or whether, contrary to that finding, the agents' true purpose in searching Abel's hotel room was to discover evidence of his espionage activities; (3) whether, assuming that the search was conducted in good faith, the articles seized by the I. N. S. agents might lawfully be seized in the absence of a search warrant.

Proper understanding of the several facets of the search and seizure issue raised by the appellant necessitates that we state in some detail the circumstances surrounding his arrest and the search of his hotel room. For, as the Supreme Court has frequently observed, only "unreasonable searches and seizures" are prohibited by the Fourth Amendment, and the determination of whether a search or seizure is unreasonable depends upon the particular facts and circumstances of each case. See *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Harris v. United States*, 331 U. S. 145 (1947).

Almost immediately after Hayhanen's disclosures in early May of 1957, agents of the F. B. I. placed Abel under

⁸ 8 U. S. C. §1252(a) provides that "Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody." Pursuant to the authorization of delegation contained in 8 U. S. C. §1103(a), regulations have been promulgated authorizing the issuance of warrants by district directors of the Service. 8 C. F. R. 242.2(a)

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surveillance. On several occasions he was observed at 252 Fulton Street in Brooklyn, the address of the studio which he had rented. Also, on a date which does not appear in the record, F. B. I. agents rented the room in the Hotel Latham immediately adjacent to that occupied by Abel under the name of Martin Collins. Meanwhile, Hayhanen, who had been flown from Paris to New York, continued his cooperation with United States officials and directed F. B. I. agents to various espionage materials which he accused Abel of having given to him.

On June 13 agents of the I. N. S. were for the first time informed that the F. B. I. had information concerning an alien illegally in this country. This information was conveyed by one Sam Papich, the F. B. I. liaison officer with the I. N. S., to Mario T. Noto, Deputy Assistant Commissioner for Special Investigations of the I. N. S. Noto was also informed that there was evidence that the suspect, Abel, had engaged in espionage. At Noto's request Papich stated that he would attempt to obtain additional information relating to Abel's illegal entry and his status in the United States. Noto testified at the hearing on the motion to suppress that he had not asked Papich for any information concerning Abel's espionage activities, "because my interest from a jurisdictional viewpoint is confined to the illegal status which he had in the United States." Noto further testified that Papich had not requested I. N. S. to treat the case in any particular manner and that, aside from this request by him for further information, no arrangements for cooperation were made between the two departments. Approximately a week later Papich returned and gave Noto the additional information which the latter had requested, including the fact that the suspect's true name was Rudolph Abel, that he had entered the country by way of Canada, that in so doing he had used a birth certificate which was not his own, and that he had stated to several persons that he was in this country illegally. Noto was also informed that Abel was an officer in the

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Soviet espionage system. Prior to this time, Noto had conducted a search of I. N. S. records to determine whether I. N. S. had any information concerning the suspect.

After obtaining this additional information from Papich, and after acquainting General Swing, the Commissioner of the I. N. S., with the details of the case, Noto again met with F. B. I. agents. At one point during this meeting he informed the agents that he "would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes * * *." Later, he informed the agents that he would "very quickly" order the arrest of Abel for "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act which makes it a deportable offense." On June 20 Noto met with two other I. N. S. officers and informed them for the first time of the Abel case. These three men then went to the offices of the F. B. I. where the evidence against Abel was again reviewed. The I. N. S. officials agreed that the evidence was sufficient to justify issuance of a "show cause" order as to Abel's deportability and that an administrative arrest warrant should be drawn. The decision to use an administrative warrant was, in effect, a decision that Abel should be held for a deportation hearing and not apprehended as one charged with a criminal offense; but at the hearing on the motion to suppress Noto testified that in his expert opinion the election to commence deportation proceedings would not preclude a subsequent criminal prosecution. Noto testified that he alone made the decision as to the type of proceeding which was to be initiated.

The "show cause" order and arrest warrant were drawn in Washington and Noto instructed two I. N. S. agents to take them to New York to be signed by John Murff,

¹ The failure of an alien to notify the Attorney General of his address as required by 8 U. S. C. §1305 is a criminal offense under 8 U. S. C. §1306 and constitutes grounds for deportation under 8 U. S. C. §1251.

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Acting District Director of the I. N. S. there, after which they were to supervise the arrest of Abel. The agents were also instructed to communicate with the F. B. I. office in New York. Noto testified that this latter instruction was given on his own initiative and that it had not been requested by agents of the F. B. I. The I. N. S. agents went to New York where they carried out the instructions which Noto gave them. After Murff had signed the "show cause" order and arrest warrant, the I. N. S. agents communicated with the agents of the F. B. I. who requested an opportunity to talk with Abel prior to his arrest. The purpose of this request, which was granted by the I. N. S. officials, was to determine whether Abel would agree to "cooperate." Agent Farley, one of the I. N. S. agents who made the arrest, testified that his instructions were to make it; and that, contrary to appellant's contention, he received no instructions that the arrest was to be contingent upon whether or not appellant agreed to cooperate with the F. B. I. agents.

At approximately 7:00 A. M. on June 21, while I. N. S. agents waited in an adjoining room, agents of the F. B. I. knocked on the door of Abel's hotel room and gained admittance to it. They showed Abel their credentials and informed him that they were charged with the duty of investigating matters pertaining to the internal security of the United States. Abel, whom the agents addressed as "Colonel," was asked a number of questions, some of which he answered. He declined to reply to others. He was told that the agents had information that he had engaged in espionage and that his "cooperation" was solicited. He was also told that if he did not "cooperate," he would be arrested before he left the room. After nearly a half hour of questioning, the F. B. I. agents decided to have the I. N. S. agents arrest the appellant, and one of them left the room to so notify them. Thereupon, the I. N. S. agents entered the room and arrested Abel. They then searched the room for the purpose, according to their testimony, of

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finding either weapons or evidence of alienage. It is undisputed that the F. B. I. agents, though present when the search was made, did not participate in it. The only articles seized during this search were: (1) a birth certificate in the name of "Martin Collins"; (2) a birth certificate in the name of "Emil Goldfus"; (3) an international certificate of vaccination issued in the name of "Martin Collins"; and (4) a bank book issued by the East River Savings Bank in the name of "E. R. Goldfus."

While they were in Abel's room the I. N. S. agents also seized three slips of paper, only one of which was offered and admitted into evidence. These slips were seized under the following circumstances: The agents told Abel that he could pack and take with him anything that he desired. When he had finished packing he asked for and received permission to repack one of his bags. While he was repacking the bag, one of the I. N. S. agents noticed that he was trying to secrete some papers in his sleeve. These papers then were seized by the agent. The one that was introduced into evidence was a strip of graph paper containing a coded message in grouped digits.

Abel gave agent Farley a sufficient amount of money to pay the rent for his room until 3:00 P.M. of that day, and this money was paid to the hotel by another agent who promptly checked Abel out. At approximately 8:30 A.M. the I. N. S. agents left the hotel with Abel and drove to the district office of the I. N. S. As soon as they had left, F. B. I. agents inquired of the hotel manager whether Abel had "checked out" and, upon receiving an affirmative answer, they requested and received from the hotel manager a written consent to search the room which Abel had occupied. When these agents searched the room they seized the entire contents of a wastebasket which partially consisted of articles which Abel had discarded while packing. Only two articles seized during this search were offered and admitted into evidence: a piece of wood wrapped in

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sandpaper and containing a cipher pad, and a hollowed-out wooden pencil containing microfilm.

On these facts Judge Byers, who heard the motion to suppress, rejected the appellant's contention that federal agents had violated the Fourth Amendment. He held that I. N. S. agents making an arrest pursuant to an administrative warrant may, as an incident of that arrest, conduct a search of the hotel room in which the arrest is made, and he found that the search of Abel's room was made in good faith for the purpose of discovering weapons and evidence of alienage and not for the purpose of uncovering evidence of Abel's espionage activities. For the reasons hereinafter stated we agree with this conclusion of law and decline to reverse this finding of fact.

A: *Lawfulness of Search Incident to Arrest upon Deportation Charges.*

With the single exception of *Trupiano v. United States*, 334 U. S. 699 (1948), overruled in *United States v. Rabino-witz*, *supra*, the Supreme Court has consistently held that government agents may, as incident to a lawful arrest, conduct a search of the premises where the arrest is made. *Harris v. United States*, *supra*; *Agnello v. United States*, 269 U. S. 20 (1925). Counsel for the appellant point out that in every case in which such a search has been upheld the arrest was made for the commission of a crime. Relying upon *Harisiades v. Shaughnessy*, 342 U. S. 580 (1952), in which deportation proceedings were characterized as civil rather than as criminal proceedings, counsel urge that the issuance of the administrative arrest warrant and the apprehension of appellant pursuant to it did not confer upon the arresting officers the right to search the hotel room in which the arrest was made. Some support for this position may be found in *Robinson v. Richardson*, 13 Gray 454 (Mass. 1859) in which the Supreme Judicial Court of Massachusetts held a Massachusetts statute invalid as

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authorizing "unreasonable searches and seizures" because it provided for the issuance of warrants to search for the property and books of account of insolvent debtors. During the course of its opinion, later cited with approval in *Boyd v. United States*, 116 U. S. 616 (1886), the court pointed out that "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings, or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals." 13 Gray at 456. Nevertheless, although the Massachusetts court mentioned the civil nature of the proceedings, later portions of its opinion indicate that the main objection it found to the use of a search warrant the statute authorized was that it "is to be used exclusively . . . as a remedial process in cases where nothing but a personal claim or the right to prosecute a private suit is involved." 13 Gray at 457 (emphasis supplied).

By contrast, deportation, like punishment for crime, as Judge Byers stated below, "is initiated in the interests of the United States and for the protection of its citizens. . . ." 155 F. Supp. at 10. The similarity between criminal actions and deportations is attested to by the fact that the identical charges upon which Abel was arrested may be made the subject either of a criminal prosecution, 8 U. S. C. §§1306, 1325, or a deportation hearing, 8 U. S. C. §§1251(a)(1), 1251(a)(5). Moreover, the procedure applicable to deportation proceedings, though in some respects different than that applicable to criminal proceedings, see *Carlson v. Landon*, 342 U. S. 524, 537 (1952), is in many ways similar. Arrest and detention are provided for by statute, see 8 U. S. C. §1252(a), and indeed have been recognized by the Supreme Court as a necessary part of the deportation procedure. *Carlson v. Landon*, *supra*, at 538.

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With these similarities in mind, there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience which justify the former are no less strong in the case of the latter.⁸

Of course, as counsel for the appellant point out, the warrant upon which Abel was arrested was an administrative warrant and hence was not issued under the safeguards associated with judicially issued warrants of arrest. Nevertheless, the search by the I. N. S. agents was not rendered unlawful on that account. Searches conducted as incident to a lawful arrest have frequently been upheld by the courts even though the arrest was made without issuance of any process. See *e.g.*, *Agnello v. United States*, *supra*, at 30; *Marron v. United States*, 275 U. S. 192, 198-99. And, in this Court at least, it has long been settled that a search conducted pursuant to an arrest made without a warrant is not dependent upon the urgency of the situation. In *United States v. Lindenfeld*, 142 F. 2d 829 (2 Cir. 1944), we sustained the validity of a search without a warrant as incident to an arrest without a warrant where the lawfulness of

⁸ As far as we have been able to determine, the Third Circuit appears to be the only appellate court to have considered the power of I. N. S. agents to conduct a search as incident to a lawful arrest in connection with deportation proceedings. See *Diogo v. Holland*, 243 F. 2d 571 (3 Cir. 1957); *Da Cruz v. Holland*, 241 F. 2d 118 (3 Cir. 1957). Both of those cases were decided *per curiam*, and neither contained a discussion of the problem, but in each case the court apparently assumed that searches made by I. N. S. officers incident to lawful arrest are not unlawful *per se*. In *Taylor v. Fine*, 115 F. Supp. 68, 70 (S. D. Cal. 1953), Chief Judge Yankwich stated by way of dictum that "Incidental to a legal arrest whether with or without a warrant, the officers [I. N. S. agents] may conduct a reasonable incidental search," but each of the cases which he cited in support of this proposition involved a criminal prosecution.

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the arrest was due to the fact that a felony had been committed (though not in the presence of the arresting officers) and the arresting officers had probable cause for believing that the person arrested had committed it. Cf. *United States v. Jones*, 204 F. 2d 745 (7 Cir. 1953). In view of these decisions, we hold that the search by the I. N. S. agents was lawful even though the arrest was not authorized by a judicially issued warrant for the arrest of appellant.

B. Lawfulness of Search—"Good Faith" of Arresting Officers.

The appellant next contends that the search conducted by the I. N. S. agents was unreasonable and violated the Fourth Amendment because the true objective of the arresting officers who conducted the search was to uncover evidence of espionage rather than to discover weapons or evidence of alienage. Cf. *Harris v. United States, supra*. This contention, vigorously denied by the Government, was rejected by Judge Byers who, at a pre trial hearing upon appellant's motion to suppress the articles seized, found that the arresting officers in good faith searched Abel's hotel room for the purpose of finding weapons or evidence of alienage. This finding may not be set aside unless, from a survey of the record, we are convinced that it was clearly erroneous. *Davis v. United States*, 328 U. S. 582 (1946). Examination of the record developed at the pre-trial hearing on appellant's motion to suppress demonstrates that there is an adequate foundation to support Judge Byers' finding. To be sure, the I. N. S. first learned of Abel's illegal presence in this country from the F. B. I., but that does not indicate that the I. N. S. search was not made in good faith. Nor does the fact that F. B. I. agents received permission to question Abel prior to his arrest by I. N. S. agents indicate that the I. N. S. agents did not act in good faith. In effect, appellant's attack on the trial judge's finding

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amounts to an argument that it is absurd to believe that two law enforcement agencies of the Government, both integral parts of the Justice Department, would limit themselves to searching for evidence of alienage when they had more than ample reason to suspect that the inhabitant of the room which they were searching was a high-ranking espionage agent in the employ of a foreign government. We do not deny that such an inference might be drawn from the evidence, but the reasonableness of such an inference is not presently before us. The only question before us is whether the evidence in the record supports the finding of good faith made by the court below. The answer to that question must clearly be in the affirmative.

Noto testified that the interest his Service had in the appellant was confined to the latter's illegal presence in the United States. He further testified the only role played by F. B. I. agents in connection with the arrest was that they provided the I. N. S. with information concerning Abel's illegal status; and that he alone, with no request from the F. B. I., decided to arrest Abel and to institute deportation proceedings rather than a criminal prosecution. One of the I. N. S. agents who made the arrest testified that he had not received instructions to effect the arrest only if Abel refused to "cooperate" with the F. B. I. and that he had not been instructed to search for evidence of espionage. Both this agent and another I. N. S. officer testified that they were searching for evidence of alienage. Surely we cannot hold that the trial judge was bound to reject this direct evidence of good faith and instead base his finding upon the unsupported and contradicted inference which the appellant urges.

The appellant, by affidavit, sought to sustain his version of the purpose of the search by presenting to the court an article printed in the New York Herald Tribune, under date of August 12, 1957, purportedly setting forth cer-

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tain statements made by Lieutenant General Joseph M. Swing, Commissioner of the I. N. S.⁹

The article reported that General Swing had stated that the arrest of Abel "was made at the specific request of 'several government agencies' . . ." and "that Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it." At the very most, the content of this newspaper article if worthy of any court consideration at all only created a conflict in the record which the trial judge was empowered to resolve. Beyond this, however, we see no reason why the trial judge should have credited this multiple hearsay. Not only was the newspaper report itself hearsay, but, on the testimony of Noto, it is clear that General Swing had no first-hand

⁹ The pertinent portions of the articles are as follows:

SPY HUNTERS HAD EYE ON ABEL A YEAR

ARREST MADE AT THEIR REQUEST

By RICHARD C. WALD

The immigration authorities' arrest of alleged master spy Rudolph Ivanovich Abel was made at the specific request of "several government agencies," it was revealed yesterday by Lt. Gen. Joseph M. Swing, Commissioner of Immigration.

"We were well aware of what he was when we picked him up," Gen. Swing said. "Our idea at the time was to hold him as long as we could."

Gen. Swing indicated that Abel would not have been arrested by Immigration officials on June 21 if American counter-intelligence had not requested it. The commissioner said he could not comment, however, on which agencies provided the information or asked for the arrest. In all cases, it is standard Immigration Service procedure to notify all government intelligence agencies of a pending arrest before it is made, he said.

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knowledge of the extent of cooperation between the I. N. S. agents and those of the F. B. I.¹⁰

Moreover, the direct testimony by I. N. S. agents as to the purpose for their search is corroborated by evidence in the record as to the articles seized by them during their search. As we have previously noted, the only articles seized by the I. N. S. agents during their search of the hotel room were (1) the Martin Collins birth certificate, (2) the Emil Goldfus birth certificate, (3) the international certificate of vaccination in the name of Martin Collins, (4) a bank book issued by the East River Savings Bank to E. R. Goldfus, and (5) several slips of paper which the agents observed Abel trying to secrete in his sleeve. Clearly the seizure of the first four items was wholly consistent with a search conducted to obtain evidence of alienage, for these items were "the instrumentalities and means" by which Abel was able to maintain his illegal status in this country. See *Harris v. United States*, *supra*, at 154. And the fact that the agents limited themselves to only seizing these articles is convincing evidence that their search was conducted in good faith. The later seizure of the slips of paper by the I. N. S. agents does not reflect adversely on their good faith, for it is undisputed that these slips were taken only after Abel was detected trying to hide

¹⁰ It should be noted that even if the newspaper report of the interview with General Swing were to be credited, then there would only be evidence that the arrest was made at the request of counter-intelligence. This would not be inconsistent with the direct evidence that the search incident to the arrest was conducted solely for the purpose of discovering evidence related to the offense charged in the administrative arrest warrant.

We have related in considerable detail the evidence in the record bearing upon the amount of cooperation between the F. B. I. and the I. N. S. and, also, the extent to which the I. N. S. restricted its activities to performance of its statutory duties. We have done so because in our opinion this evidence bears importantly upon the "good faith" with which the I. N. S. agents conducted the search. It should be clear that we have no intention of suggesting that it would be improper for these two agencies of the Department of Justice to cooperate with each other.

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them. The agents' good faith obviously was not impugned by their seizure of what the arrested man had tried to hide.

C. Lawfulness of Seizure.

The appellant contends, however, that even though the search was lawful and even though it was conducted in good faith, the seizure by the I. N. S. agents was unreasonable because the articles seized did not relate to the offense charged in the arrest warrant. We consider this contention only insofar as it pertains to the taking from Abel's person of the papers which he had attempted to hide, for as we have indicated above, with the exception of these papers, everything seized by the I. N. S. agents related to the offense charged in the warrant of arrest. In *Harris v. United States*, *supra*, agents of the F. B. I., acting under the authority of two warrants of arrest charging the defendant with mail fraud, went to his apartment and arrested him there. Incident to the arrest they searched the apartment and while they were doing so discovered and seized eight Notice of Classification cards and eleven Registration Certificates, the possession of which by the defendant was in violation of the Selective Training and Service Act of 1940, 54 Stat. 885, and of Section 48 of the Criminal Code, 35 Stat. 1098. The defendant was later convicted upon an indictment charging him with unlawful possession, concealment and alteration of the seized articles. The admission into evidence of the seized articles, over objection of the defendant, was upheld by the Supreme Court on the ground that the F. B. I. agents had undertaken the search in good faith for the purpose of discovering evidence concerning the crime charged in the warrant. It is true that in *Harris* the seized objects were government property unlawfully in the possession of the defendant and that the Supreme Court somewhat relied upon that fact in holding them subject to seizure, see 331 U. S. at 155, but that circumstance would not appear to be a limiting factor upon the applicability of

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the *Harris* decision. Earlier in its opinion the Court had stated that "the objects sought for and those actually discovered were properly subject to seizure." 331 U. S. at 154. It then went on to differentiate between "merely evidentiary materials . . . which may not be seized . . ." and those objects which may validly be seized including the instrumentalities and means by which a crime is committed . . . and property the possession of which is a crime." Thus it appears that the circumstance that the seized articles in the *Harris* case were government property unlawfully in the possession of the defendant was relevant only insofar as it was necessary to show that because they were such articles they were among the four classes of items properly subject to seizure.¹¹ Cf. *Kelly v. United States*, 197 F. 2d 162 (5 Cir. 1952); *United States v. Braggs*, 189 F. 2d 367 (10 Cir. 1951). Similarly, the papers taken from Able's person were subject to seizure, for it is clear that they were the "instrumentalities and means" by which he might commit the crime of espionage.

Of course, as Judge Learned Hand has observed in *United States v. Poller*, 43 F. 2d 911 at 914 (2 Cir. 1930), "[T]he real evil aimed at by the Fourth Amendment is the search itself . . ." Since the only proper motive which may impel government agents to conduct searches in connection with an arrest is the desire to obtain information which will be helpful in the prosecution of the crime for which the arrest is made, we well recognize that by placing "limitations upon the fruit to be gathered [from such a search we] tend to limit the quest itself . . .". *United States v. Poller*, *supra*, at 914.

¹¹ The four classes of objects enumerated in *Harris* as properly subject to seizure during a lawful search are: (1) the instrumentalities and means by which a crime is committed, (2) the fruits of the crime, such as stolen property, (3) weapons by which the escape of the person arrested might be effected, and (4) property the possession of which is a crime. 331 U. S. at 154.

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However, in a case such as the present one, where the trial court properly has been convinced that the motivation for the search is the hope of obtaining evidence of the offense for which the arrest is being made, the constitutional prohibition against unreasonable searches is not transgressed; and hence, when, during such a permissible search, articles within the categories enumerated in *Harris* that were not searched for are in fact discovered no useful purpose would be served by prohibiting seizure of them if they tend to prove the commission of a crime even though the crime be unrelated to the crime for which the arrest is being made. Here, obviously, any limitation we might put upon the use that can be had of articles uncovered by the search would not "tend to limit the quest"

We construe the rule in *Harris* as not being limited to its own facts or to situations in which the seized objects uncovered in good faith by a not unreasonable search happen to be contraband, for there is no valid distinction in holding lawful the seizure of contraband and in holding unlawful seizures of articles which fall within the other categories enumerated in that case. Therefore, we hold that the seizure by I. N. S. agents of the slips of paper which Abel attempted to secrete was not in violation of the Fourth Amendment.

H. Sufficiency of the Evidence.

As we have previously indicated, the record contains more than ample evidence to establish that the appellant, while in this country, conspired with others to act on behalf of the Soviet Government. He contends, however, that there is inadequate evidence in the record to support the charges in Counts 1 and 2 of the indictment that the purpose of the conspiracy was to gather and transmit to the U. S. S. R. information relating to the national defense of the United States. In this connection, reliance is placed upon *United States v. Heine, supra*, in which we reversed a conviction under 18 U. S. C. §34, the predecessor of 18 U. S. C. §794(d),

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because the evidence established that the information communicated by the defendant to the foreign government by whom he was employed was "lawfully accessible to anyone who was willing to take the pains to find, sift and collate it . . ." 151 F. 2d at 815. The appellant contends that there is no evidence in the record which indicates that he ever succeeded in communicating or conspired to communicate any information other than the type which we held could lawfully be sent abroad in the *Heine* case.

It is true that there is no evidence indicating that Abel or his co-conspirators ever succeeded in gathering or in transmitting any unlawful information. There is not the slightest hint in the record that these espionage agents met with any success. However, appellant was charged with and convicted of having conspired with others in a criminal conspiracy to gather and transmit to the Soviet government secret information pertaining to the national defense of the United States, and the record is abundantly clear that Abel knew of the unlawful purpose of this conspiracy. The conspirators' lack of success, if indeed they were unsuccessful, does not lessen the criminality of their activities. *United States v. Rabinowich, supra*; *United States v. Morello, supra*.

Hayhanen was sent to this country by the Soviet government to act as Abel's assistant and for several years he acted in this capacity. During his direct examination he testified as follows:

"Q. Now, let me ask you this directly: What type of information were you seeking? A. Espionage information.

Q. Would you describe that, what you mean by espionage information? A. By espionage information I mean all information what you can look to get from newspapers or official way, by asking from, I suppose, legally from some office, and I mean by espionage information that kind of information what you have to get illegal way. That is, it is secret information for—

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The Court: Concerning what? What kind of information

The Witness: Concerning national security or—

The Court: What do you mean by that?

The Witness: In this case United States of America.

The Court: What do you mean by national security?

The Witness: I mean it—that some military information or atomic secrets.”

The appellant seeks to denigrate this testimony by characterizing it as a “clearly rehearsed statement of a legal conclusion.” We do not so understand it. Hayhanen did not merely testify that the purpose of the conspiracy was to obtain “espionage information” or “secret information concerning the national security,” but he specifically mentioned obtaining “military information or atomic secrets.” His failure to elaborate in more detail concerning the information which the conspirators sought to acquire is readily explainable in light of his prior response to the following question:

“Q. During this conversation or during the receipt of these oral instructions from Pavlov,¹² did he give you any directions as to the type of information? A. Yes, he did.

He told that it depends what kind of illegal agents I will have, so it depends then what kind of information they can give, where they work or whom they have as friends and such and such things. . . .”

Under these circumstances, it is not surprising that Hayhanen’s testimony did not reveal any specific plans for obtaining secret information. His failure to so testify is

¹² Pavlov was named in the indictment as a co-conspirator and at the trial was shown to be in charge of the American espionage section of the Soviet State Security Service.

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indicative only of the fact that he had never been successful in his nefarious activities. He did, however, testify to a sequence of events which not only provided additional information tending to prove the purpose of the conspiracy but also tending to prove that Abel was aware of that purpose. This is the testimony relative to the attempts which he and Abel made, under orders from Moscow, to locate Sergeant Rhodes. The reason why Abel had been ordered to locate Rhodes has already been indicated:

"He [Abel] said the Quebec [Rhodes] could be a good agent because he is—some of his relatives are working on—and he—on military lands.

He meant Quebec's brother, who was working somewhere—I cannot remember exactly, but in some atomic plant, or what it was."

Surely the jury was justified in inferring from this testimony that Abel and his co-conspirators were interested in establishing contact with Rhodes because of their belief that he was a potential source of secret atomic information.

Moreover, the jury cannot have failed to be impressed by the elaborate precautions taken by the conspirators to keep their activities secret. Men intent upon gathering and transmitting only such information as is available to the general public do not ordinarily find it necessary to employ secret codes; microdots; hollowed-out coins, pencils, or matchbooks; "drops"; and the variety of other devices which Abel and his colleagues used. To be sure, the defendant in *Heine* had employed devious methods to transmit information which this Court later held might lawfully be transmitted; but our reversal of his conviction does not establish that evidence of such devious methods has no probative value. In *Heine* the information which the defendant had gathered and transmitted was known to the court. No room was left for inference. The present case is quite the contrary. Abel and his co-conspirators—unlike Heine and his—did not, as far as we know, succeed with their plans.

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Hence, an inference as to their purpose is properly drawn from the methods which they employed. We do not intimate that proof of the methods alone would be sufficient to sustain a conviction. We merely hold that the justifiable inference from the use of such methods by the appellant and his associates, when considered together with the other evidence which we have discussed, was sufficient to justify the jury in finding that the object of the conspiracy in the present case was to gather and transmit to the U. S. S. R. information concerning the national defense of the United States which was not "lawfully accessible to anyone who was willing to take the pains to find, sift and collate it . . . " 151 F. 2d at 815.

III. Admissibility of Rhodes' Testimony.

Roy A. Rhodes, a master sergeant in the United States Army, was called as a witness by the Government, and, insofar as relevant, testified substantially as follows: In 1951, at which time he had been in the Army for nearly a decade, he was assigned to serve as Motor Sergeant at the American Embassy in Moscow. When he arrived in Moscow, in May 1951, he was not accompanied by his family, but in December of that year he received notification that the Soviet government had granted visas to his wife and child and that they would be able to join him. To celebrate this good news, Rhodes had several drinks after lunch and before going back to work. When he returned to work he continued his drinking, now in the company of two Russian nationals who were employed at the Embassy garage apparently as assistants to Rhodes. Late that afternoon the girl friend of one of the Russians came to the garage with a female companion. It was suggested, and Rhodes agreed, that the two women, Rhodes, and one of the Russians employed at the embassy should go out for dinner. The foursome spent the evening together, dancing, drinking and eating. The following morning, according to Rhodes' testimony, he "woke up . . . in bed with this girl in what I

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had taken to be her room." He did not see this woman again for several weeks, but then, in response to a telephone call, he arranged a meeting with her. At this meeting he was told that "she has trouble." During the course of this discussion Rhodes and the woman were joined by two men, one of whom was introduced as the woman's brother, and the other as "Bob Day" or "Bob Smith." Rhodes thereafter had quite a number of meetings with Soviet citizens, some of whom were civilians and some of whom were members of the military. At these meetings Rhodes was given varying sums of money by the Russians, totaling between \$2500 and \$3000, in exchange for information which he gave them. The information for which he was paid concerned, *inter alia*, his duties at the embassy and the personal habits of American military and State Department personnel.

Rhodes also testified that in June 1953 he was transferred from Moscow to San Luis Obispo, California. Prior to his transfer, the fact of which he communicated to Soviet agents, he was given instructions as to how he might contact or be contacted by Soviet agents in the United States. Rhodes then testified that after he returned to this country he did not again have contact with agents of the Soviet Government. In December 1953 he was transferred from San Luis Obispo to Fort Monmouth, New Jersey, then transferred to Fort Huachaca, Arizona, and then back to Fort Monmouth. During his second tour of duty at Fort Monmouth, Rhodes and his family lived in Eatontown, a town which is almost contiguous with Red Bank.

He also testified that during 1955 his father and his sister, Arlene Brown,¹³ lived in Howard, Colorado, a town

¹³ Arlene Brown was called as a witness by the Government. She testified that in the spring of 1955 she received a telephone call concerning her brother from a man who spoke with a very heavy accent.

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near Salida, Colorado.¹⁴ Counsel for the appellant strenuously objected to Rhodes' testimony. At the trial, and now on appeal, they contend that his testimony was not rele-

¹⁴ Prior to the trial Rhodes had given statements concerning his activities in Moscow to the F. B. I. and to the Department of the Army. Both of these statements, in their entirety, were made available by the Government to counsel for the defense. Examination of the statements by defense counsel revealed a discrepancy as to one important particular in the two statements. However, as this discrepancy related to a matter which the Department of the Army considered classified information, Rhodes was not questioned about it on either direct or cross-examination. Instead, appellant's counsel and counsel for the Government stipulated that the trial judge should inform the jury that a contradiction as to this one particular existed between the two statements. Accordingly, prior to cross-examination of Rhodes, the judge stated to the jury:

"Members of the jury, as you probably realize, when we took a recess it was for the purpose of a consultation between the Court, counsel for both sides, and other representatives of the United States Government.

As the result of that conference, it was brought to light that the witness Rhodes gave certain statements to the Army and to the F. B. I. during the month of June, 1957 and, I think, July and perhaps later.

Those statements were the basis of the consultation.

At the end of the discussion, which was quite informal, the United States concedes with respect to one item referred to in those statements this witness has made conflicting statements.

The subject matter involved was not brought out on his direct testimony because, in the opinion of the Government, it would not have been in the interests of national security for that subject to have been inquired into.

The conflict pertained to his version of his activities in Moscow, and an important incident which there occurred.

Both counsel have agreed that since this concession is before the jury, namely the concession that the witness has made conflicting statements, the witness has been to this extent discredited. Such is the purpose of cross-examination.

Counsel for both sides have agreed that no useful purpose would be served by pursuing the subject further.

The statements made by Rhodes to the Army and to the F. B. I. have been made available to this court, in their entirety, and have been examined by us. In our opinion, the trial judge's statement to the jury accurately reflected the substance of the discrepancy between the two statements, and the rights of the appellant were in no way prejudiced by the withholding from the jury of the subject matter of this discrepancy.

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vant to any of the issues raised during the trial and that insofar as it contained a recitation of crimes in which the appellant was never shown to have participated, it was highly prejudicial to appellant. The Government, on the other hand, contends that Rhodes' testimony was admissible as tending to corroborate Hayhanen's testimony concerning the efforts made by him and Abel to locate Rhodes. It was upon this theory that the trial judge admitted the testimony.

The issue is not so much one of law as it is one of logic. The question to be answered is whether as a result of Rhodes' testimony we, or the jury, know more about the circumstances of this case than would have been known if the testimony had been excluded. We think it clear that the answer to that question must be stated in the affirmative. Hence, we conclude that Rhodes was properly permitted to testify.

To be sure, Abel was not chargeable with responsibility for Rhodes' activities while the latter was in Moscow; but the fact that Rhodes had engaged in those activities, that he had notified Soviet agents of his transfer to the United States, and that arrangements were made whereby Rhodes and Soviet agents could contact one another in this country, lent credence to the testimony of Hayhanen that he and Abel, both agents of the Soviet Government, had received instructions to locate Rhodes and that they had made efforts to do so. Phrased somewhat differently, the effect of Rhodes' testimony was to better enable the jury to pass upon the credibility of a material portion of the testimony of Hayhanen. The jury determination as to whether Hayhanen spoke truthfully or falsely about the instructions he had received and the efforts made by him and Abel to locate Rhodes was materially aided by testimony tending to show that a strong motive existed to locate the latter. Rhodes' testimony provided that motive.

It should be borne in mind that this is not a case in which there has been an attempt to create an aura of credibility with respect to the testimony of an accomplice

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witness by introducing independent corroborative evidence of minor matters to which the accomplice testified. See *People v. Nitzberg*, 287 N. Y. 183, 38 N. E. 2d 490 (1941); *Commonwealth v. Holmes*, 127 Mass. 424 (1879); but cf. *Hoback v. United States*, 296 Fed. 5 (4 Cir. 1924), cert. denied, 265 U. S. 594; *United States v. Biebusch*, 1 Fed. 213 (E. D. Mo. 1880); *Avcock v. State*, 62 Ga. App. 812, 10 S. E. 2d 84 (1940); *Ettinger v. Commonwealth*, 98 Pa. 338 (1881). Rhodes' testimony tended to prove the truth of Hayhanen's testimony, not because it tended to confirm some of the details of the latter, but because the circumstances which Rhodes related made it more likely that Rhodes was, as Hayhanen had testified, being sought by foreign espionage agents.

IV. *Alleged Deprivation of a Fair Trial.*

The final ground for reversal urged by the appellant is that during the trial a variety of minor errors occurred which, cumulatively, had the effect of depriving him of a fair trial. A careful perusal of the record indicates that this contention is unfounded. Although occasional error did occur at the trial—indeed, it would be somewhat surprising not to find minor error in the course of a trial lasting approximately two weeks—we cannot find that the appellant was injured thereby.

The most important of these errors complained of by the appellant is the refusal of the trial judge to grant two motions, one made prior to the trial and one at the close of the Government's evidence, to strike as surplusage a recital in the tenth paragraph of both the first and second counts of the indictment that it was a part of the conspiracy charged that Abel and his co-conspirators "would engage in acts of sabotage against the United States." See Rule 7(d) Fed. Rules Crim. Proc. Even though we agree with the appellant that the reference to sabotage was surplusage, we are unable to see how that reference could have been prejudicial to his interests. As appellant points out, "sabotage," unlike the crime of "espionage" charged in the

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indictment, connotes violence and destruction and hence might tend to inflame the jury; but there was no testimony in the case concerning sabotage or a conspiracy to commit sabotage, and the jury was carefully instructed by the trial judge that the indictment was not evidence and was not to be considered by them as evidence. Under these circumstances, we think that the failure of the trial judge to grant the motions to strike was such insubstantial error that it falls within the injunction of Rule 52(a), Fed. Rules Crim. Proc. Cf. *Catrina v. United States*, 176 F. 2d 884 (9 Cir. 1949).

The appellant also alleges that a series of errors occurred during the examination of witnesses—particularly during the examination of Hayhanen. Thus, it is contended that Hayhanen was continuously led by the prosecutor, that the conversations with Abel to which Hayhanen testified were needlessly vague, and that a variety of improper questions were put to him. No purpose would be served by a detailed discussion of these alleged improprieties. As to some we do not find that any error was committed; others were matters within the discretion of the trial judge, who, in our opinion, did not abuse that discretion; and as to the remainder we think that the alleged errors were not so prejudicial as to require a new trial in this case where the “record fairly shrieks the guilt” of the accused. *Lutwak v. United States*, 344 U. S. 604, 619 (1953).

Subsequent to his indictment the appellant requested the district court to appoint counsel for him, to be recommended by the local bar association. In accordance with this request, the district court appointed James B. Donovan as chief defense counsel. Arnold Guy Fraiman was subsequently appointed as associate defense counsel. Both at the trial and on this appeal these attorneys, together with Thomas M. Debevoise, II, who assisted them, have represented the appellant with rare ability and in the highest tradition of their profession. We are truly grateful to them for the services which they have rendered.

Affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT:

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of July, one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge.

HON. J. EDWARD LUMBARD,

HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RUDOLPH IVANOVICH ABEL, a/k/a "Mark" & a/k/a Martin
Collins & Emil R. Goldfus,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

1.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE
UNITED STATES OF AMERICA.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE
UNITED STATES OF AMERICA.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3.

18 U. S. C. §794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether

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recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section; and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. As amended Sept. 3, 1954, c. 1261, Title II, §201, 68 Stat. 1219.

4.

18 U. S. C. §793. Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of

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the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal, station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument,

Appendix C.

appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

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(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. June 25, 1948, c. 645, §1, 62 Stat. 736, amended Sept. 23, 1950, c. 1024, §18, 64 Stat.——.

5.

18 U. S. C. §951. Agents of foreign governments

Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 743.

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6.

18 U. S. C. §371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX D.

List of Exhibits and Testimony Introduced at the Trial, which were Illegally Seized or Obtained by Leads from Items Illegally Seized.**A. Items Seized at the Hotel Latham June 21, 1937.**

Exhibit 77—graphpaper with numbers	(38, 49, 665-6)
Exhibit 78—Martin Collins Birth Certificate	(45, 49, 666-7; 714-8)
Exhibit 79—Emil Goldfus Birth Certificate	(45, 48, 668-669)
Exhibit 80—International Certificate of Vaccination	(39, 49, 669-71)
Exhibit 81—East River Savings Bank Book	(45, 669-71)
Exhibit 87—Hollow pencil containing:	
Exhibit 97—Microfilms, which include:	
Exhibits 98 and 98A—Radio Receiving Schedule and Two Letters	(46, 51, 694, 726-31, 746-53)
Exhibit 88—Hollow block of wood containing book with numbers	(46, 694, 723-6, 728)
[Exhibit 21—A message, was described but never offered in evidence	(49, 432)]

B. Testimony and Exhibits obtained by Leads from Items Seized at the Hotel Latham.

Testimony of Dr. Samuel F. Groopman	(598-9)
Exhibit 74—Registration Card and Bills from Broadway Central Hotel	(45, 635-6)

Appendix D.

*List of Exhibits and Testimony Introduced at the Trial
which Appellant claims were Illegally Seized or
Obtained by Leads from Items Illegally Seized.*

- Exhibit 75—Registration Card and
Bills from Dayton Plaza Hotel... (45, 636, 713-4)
- Testimony of Robert E. Schoenen-
berger (662-76)
- Testimony of Lydell Usher and
Exhibits 82, 83, 84 and 85..... (676-85)
- Testimony of James P. Kehoe..... (693-5)
- Testimony of Frederick E. Webb
in relation to the Exhibits seized
at the Hotel Latham..... (713-9, 723-31)
- C. Testimony and Exhibits obtained by
Leads from Items Seized in Room 505,
252 Fulton Street, on June 29, 1957.
- Testimony of Ernest Tripelhorn Jr.
and Exhibits 50 and 51 relating
to the leasing of 23 Riverside
Drive by the Appellant..... (253, 257, 259,
544-7)
- Testimony of Robert R. Clark and
Exhibits 53, 54, 55, 56 relating to
a purchase of film..... (254, 257, 259,
554-560)
- Exhibits 71 and 72 relating to bank
accounts (256, 260,
630-634)
- Exhibit 73—Registration card at
the Benjamin Franklin Hotel..... (253, 257, 259,
634-5)
- D. Items Seized in Room 509, 252 Fulton
Street on August 17, 1957, consisting of
Exhibits 32 and 89 to 96 inclusive and
including testimony relating thereto..... (268-274, 461,
695-701, 709-
10, 722-3, 731-
734)

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,
PETITIONER,

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 263

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,
PETITIONER,

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 23-53) is not yet reported. The opinion of the district court denying petitioner's pre-trial motion to suppress evidence (R. 239-246) is reported at 155 F. Supp. 8.

JURISDICTION

The judgment of the Court of Appeals (P. t. 54) was entered on July 11, 1958. The petition for a writ of certiorari was filed on August 8, 1958. The juris-

diction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. (a) Whether agents of the Immigration and Naturalization Service (I.N.S.), when making a valid arrest under a warrant issued pursuant to 8 U.S.C. 1252(a) (which authorizes arrests pending a determination of deportability), may conduct a search incident to that arrest, and (b) whether the evidence supports the trial court's finding of fact, affirmed by the court below, that the I.N.S. officers who conducted the search acted in "good faith" for the purpose of seizing weapons and documents relating to petitioner's alienage and illegal status in the country.

2. Whether articles which were seized and later received in evidence were properly subject to seizure.

3. Whether the evidence supports the jury's finding that the information which it was the objective of the conspiracy to obtain and transmit to the U.S.S.R. was information relating to the national defense of the United States which was classified or otherwise unavailable to the general public.

4. Whether the testimony of a government witness, Sergeant Rhodes, that he, after being compromised, furnished information to Soviet agents in Moscow in 1952-3 and agreed to continue his cooperation upon returning to the United States, was properly admitted to corroborate the testimony of another government witness, Hayhanen, concerning his assignment in 1955 by petitioner to locate and report on a Sergeant Rhodes.

5. Whether, viewing the conduct of the trial as a whole, petitioner received a fair trial.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fifth Amendments to the Constitution of the United States and the text of 18 U.S.C. 793, 794, 951 and 371 are set forth in Appendix C to the petition for certiorari (Pet. 55-60). The pertinent provisions of 8 U.S.C. 1103(a), 8 U.S.C. 1251(a)(5), 8 U.S.C. 1252(a), 8 U.S.C. 1305, 8 U.S.C. 1306, and 8 C.F.R. 242.2(a) are set forth in the Appendix, *infra*, pp. 26-27.

STATEMENT

Petitioner was indicted on August 7, 1957. The indictment (R. 7-19), in three counts, charged petitioner with having conspired, from about 1948 to the date of the indictment, (1) to communicate and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States (conspiracy to violate 18 U.S.C. 794(a)), (2) to obtain documents and other materials connected with the national defense of the United States for the purpose of transmitting such documents to the U.S.S.R. (conspiracy to violate 18 U.S.C. 793), and (3) to act in the United States as an agent of the U.S.S.R. without prior notification to the Secretary of State (conspiracy to violate 18 U.S.C. 951).¹ After the district court heard and denied a motion, following a hearing, (R. 79-238), to suppress evidence alleged to have been obtained by unlawful search and seizure, petitioner was tried before a jury, convicted on all three counts, and on November 15, 1957, sentenced to a total of thirty years imprisonment and to pay a fine of \$3,000. The

¹ 18 U.S.C. 794 and 793 each has its own conspiracy provision. Conspiracy to violate 18 U.S.C. 951 is punishable under the general conspiracy statute, 18 U.S.C. 371,

conviction was affirmed by the Court of Appeals on July 11, 1958:

I. The events leading to petitioner's arrest are discussed at length in the memorandum opinion of the district court (R. 239-246) denying petitioner's motion to suppress, and in the opinion of the Court of Appeals (Pet. 30-35). Briefly, the following events took place:

On June 13, 1957 one Sam Papich, the F.B.I. liaison officer with the I.N.S. (R. 159, 198-199), informed Mario T. Noto, Deputy Assistant Commissioner for Special Investigations of the I.N.S., that the F.B.I. had information concerning an alien, petitioner, who had entered this country illegally, and who was suspected of engaging in espionage (R. 199-200). At Noto's request, Papich agreed to attempt to obtain additional information relating to petitioner's illegal entry and status (R. 200). Noto testified at the hearing on the motion to suppress that he had not asked Papich for any information concerning Abel's espionage activities because, he said, "my interest from a jurisdictional viewpoint is confined to the illegal status * * *." (R. 200; Pet. 31.) About a week later, Papich supplied the additional information which Noto had requested (R. 203-204). Thereafter Noto informed the F.B.I. that he intended quite shortly to order petitioner's arrest for failure to notify the Attorney General of his address (R. 207-208). After a further review of the evidence the I.N.S. finally concluded that there was sufficient basis for the issuance of a "show cause" order as to petitioner's deportability and decided that an administrative arrest warrant (a warrant used to hold aliens for deportation proceedings) should be drawn up (R. 33-37, 106-108, 115). It was Noto alone who

made the decision to use an administrative warrant rather than charge petitioner with a criminal offense² (R. 217-218, 220, 223-224).

The "show cause" order and arrest warrant were drafted in Washington (R. 163-164, 216) and taken by two I.N.S. agents to New York, where they were signed by the Acting District Director of the I.N.S. (R. 91-96). Noto, upon his own initiative, had instructed the two I.N.S. agents to communicate with the F.B.I. office in New York (R. 211) and, after the order and warrant were signed, they did so (R. 97-100, 134, 135, 137). The F.B.I. requested and was granted permission to talk with petitioner prior to his arrest, to determine whether he might agree to "co-operate" (R. 97-99, 140). However, the I.N.S. agents were not instructed that the arrest was contingent upon petitioner's willingness to cooperate (R. 140, 148; see, also, R. 177-184).

At approximately 7:00 A.M. on June 21, 1957, agents of the F.B.I. knocked on the door of petitioner's hotel room and gained admittance to it (R. 175, 241). They showed petitioner their credentials, stated that they were charged with the duty of investigating internal security matters, asked some questions, and solicited petitioner's "cooperation" in answering certain questions (R. 177-184). Petitioner answered some questions but refused to answer others. Finally, at about 7:30 A.M., the two I.N.S. agents, who had been waiting in an adjoining room, entered petitioner's room and arrested him (R. 33, 53, 67, 189). They then searched

² The failure of an alien to notify the Attorney General of his address as required by 8 U.S.C. 1305 is a criminal offense under 8 U.S.C. 1306 and constitutes grounds for deportation under 8 U.S.C. 1251(a) (5).

the single eight by twelve-foot room in which petitioner was arrested (R. 142), for the purpose, as they testified, of finding weapons or evidence of alienage (R. 68, 141, 151, 166). The F.B.I. agents did not participate in this search (R. 113, 143-144, 151, 192-193).

Articles offered in evidence which were seized during this search were: (1) a birth certificate in the name of "Martin Collins"; (2) a birth certificate in the name of "Emil Goldfus"; (3) an international certificate of vaccination issued in the name of "Martin Collins"; and (4) a bank book issued in the name of "E. R. Goldfus" (R. 666-671). During the search petitioner was told that he could pack and take with him anything that he desired (R. 109, 112). While he was packing a suitcase, one of the I.N.S. agents noticed that he was trying to slip some papers up his sleeve. These papers were seized by the agent (R. 65, 109-110, 665). The only one that was introduced in evidence was a strip of graph paper containing a coded message in grouped digits (R. 665).

After he had packed, petitioner concluded that he "might as well check out of the hotel," and gave to an I.N.S. agent sufficient money to pay the rent due on his room (R. 167-168). This money was then taken to the hotel desk and petitioner was checked out (R. 69-70, 144-146, 659-661). After petitioner had left, F.B.I. agents, upon being assured by the hotel manager that petitioner had checked out, and with the manager's written consent, searched the room which petitioner had occupied (R. 70-71, 658). During this search the F.B.I. agents seized the entire contents of a wastebasket containing articles which petitioner had discarded while packing (R. 694). Two articles which had been in

the wastebasket were introduced in evidence: a piece of wood wrapped in sandpaper and containing a cipher pad, and a hollowed-out wooden pencil containing microfilm (R. 51, 694, 724-726).

On these facts the district court denied petitioner's motion to suppress, rejecting the contention that the evidence seized by the Government had been found during a search which violated the Fourth Amendment. The trial judge found that the search of petitioner's hotel room was made in good faith for the purpose of discovering weapons and documents relating to alienage and not, as petitioner contended, for the purpose of uncovering evidence of espionage (R. 243-245). The Court of Appeals accepted this finding and concurred in the holding of the district court that I.N.S. agents, in making an arrest pursuant to an administrative warrant, may, as an incident to that arrest, search the hotel room in which the arrest is made, for certain kinds of materials, without violating the Fourth Amendment (R. 243; Pet. 35).

II. At the trial, the following evidence was adduced:

Petitioner, a Colonel in the K.G.B., a Soviet espionage service (R. 287, 290), entered the United States illegally in 1948 from Canada (Ex. 86; R. 688-691) to serve as a resident espionage officer on behalf of the Soviet Union (R. 289-290, 310-311). In a rented studio in Brooklyn (Ex. 49; R. 543-544, 561-562) he assumed the role of an artist (R. 548, 707) and the identity of Emil Robert Goldfus (R. 545, 548, 561-562, 664, 691, 707), an infant who had died in 1903 (Ex. 83; R. 678-681). On occasion he used the name Martin Collins (R. 598, 635, 636, 657, 667, 713; Exs. 74, 75, 76, 78).

In 1952, Reino Hayhanen,³ then a Major in the K.G.B. (R. 297) and the Government's chief witness at the trial, arrived in New York City (R. 351) under orders to act as petitioner's assistant in espionage work (R. 289-290).

Before leaving Moscow for the United States, Hayhanen assumed the identity of one Eugene N. Maki, who was born in Idaho (R. 288, 298-300). Hayhanen received special training in making "microdots" and preparing "soft film"⁴ (R. 304); he was schooled in cryptography and was assigned a personal code for communicating with Soviet officials (R. 467-468); he was assigned the cryptonym "Vik" (R. 305, 356); and he was trained in the method of transmitting messages in hollowed-out containers made from coins, bolts, screws, etc. (R. 305; and see, *e.g.*, Exs. 23, 45, 65, 87, 91, 91a, 92, 93, 94, 95, 96) by placing the container with the hidden message at a prearranged "drop" point⁵ where

³ Hayhanen was born in the U.S.S.R. and entered the Soviet State Security Service in 1939 (R. 290-291). He functioned as a counter-espionage agent until 1948, at which time he was summoned to Moscow and advised that his assignment had been changed to espionage work (R. 295). While in the United States in 1956, he was advised by petitioner that he had been promoted to Lieutenant Colonel. He also received a message from Moscow announcing the promotion and extending greetings (R. 457-458).

⁴ A "microdot" is a photographic reduction of a document (R. 720); "soft film" is film that is made pliable by a chemical process (and is therefore capable of being rolled and placed in a small cavity, such as a hollowed-out pencil or bolt) (R. 329, 529).

In addition to his microdot training in Moscow, Hayhanen received instruction on the subject from petitioner, who told him of an easier method which he ordered him to practice (R. 464-466).

⁵ Hayhanen, before leaving Moscow in 1952, was assigned three "drop" points in New York City—one was located in a wall in the Bronx (Ex. 2; R. 318-319), the second was under a Central Park bridge (Ex. 3; R. 320-321), and the third was under a lamp post (Ex. 4; R. 324).

it would be picked up on signal by another agent (R. 317, 328, 347).

Also prior to Hayhanen's departure from Moscow he was instructed by a superior that his assignment was to assist petitioner in supervising illegal agents in the United States and to obtain whatever espionage information they could furnish, depending on the identity of the agents, the jobs they held, their acquaintances, and similar circumstances. His mission, he testified, was to obtain military information relating to the defense of the United States, including "atomic secrets" (R. 310-315).

Hayhanen spent his first year and a half in the United States establishing himself in New York City. During that time (1952 to 1954) he communicated with the Soviets and received instructions through "drops".

A message directed to Hayhanen from Moscow at about this time evidently became mislaid. In the summer of 1953, a newspaper delivery boy in Brooklyn, while collecting on his route, accidentally dropped a nickel which he had received (Ex. 60). The nickel split into halves, revealing a piece of microfilm (Ex. 61; R. 569-571, 575). The nickel and the film were turned over to the Federal Bureau of Investigation by a New York City police detective, who received it from the newsboy (R. 572-574). The microfilm contained a numerical code message (Ex. 62; R. 575-576). In or about May, 1957, the FBI applied Hayhanen's individual code system to the message (R. 577-582). The message, deciphered into the Russian language (Ex. 63) and translated into English (Ex. 64), reads as follows:

1. WE CONGRATULATE YOU ON A SAFE ARRIVAL. WE CONFIRM THE RECEIPT OF YOUR LETTER TO THE ADDRESS "V REPEAT V" AND THE READING OF LETTER NUMBER 1.
2. FOR ORGANIZATION OF COVER, WE GAVE INSTRUCTIONS TO TRANSMIT TO YOU THREE THOUSAND IN LOCAL (CURRENCY). CONSULT WITH US PRIOR TO INVESTING IT IN ANY KIND OF BUSINESS, ADVISING THE CHARACTER OF THIS BUSINESS.
3. ACCORDING TO YOUR REQUEST, WE WILL TRANSMIT THE FOR-

[Continued]

(R. 353-356, 359-360, 366-368, 375-377), and through personal meetings with Mikhail N. Syfin, (R. 333, 360-365, 365-366), a member of the Soviet delegation to the United Nations (Ex. 38; R. 502-504).

Hayhanen first met petitioner in July or August 1954, when Hayhanen received instructions through a drop that he would be met by someone at a theatre in Flushing, New York. Hayhanen, as a means of identification, was instructed to wear his blue tie with red stripes and to be smoking a pipe. At this first meeting, petitioner expressed surprise that they were not ordered to meet earlier and stated they would have to consider a suitable "cover" employment for Hayhanen that would leave him enough free time "for espionage work." (R. 377-380.)

Prior to this time, Hayhanen had received his salary through drops; but thereafter he was paid by petitioner (R. 383). Subsequent to this meeting, petitioner and Hayhanen met once or twice a week (R. 385), but the latter never knew petitioner by any name other than the cryptonym "Mark" (R. 289). During various conversations petitioner told Hayhanen of the location of his drops and signal areas, and, on occasion, used a drop in Hayhanen's presence (R. 385-393). One message, recovered by F.B.I. agents in May, 1957, from a

[Footnote 6 Continued]

MULA FOR THE PREPARATION OF SOFT FILM AND NEWS SEPARATELY, TOGETHER WITH (YOUR) MOTHER'S LETTER.

4. IT IS TOO EARLY TO SEND YOU THE GAMMAS (MEANING HERE UNKNOWN, LITERALLY MUSICAL EXERCISES). ENCIPHER SHORT LETTERS, BUT THE LONGER ONES MAKE WITH INSERTIONS. ALL THE DATA ABOUT YOURSELF, PLACE OF WORK, ADDRESS, ETC., MUST NOT BE TRANSMITTED IN ONE CIPHER MESSAGE. TRANSMIT INSERTIONS SEPARATELY.

5. THE PACKAGE WAS DELIVERED TO YOUR WIFE PERSONALLY. EVERYTHING IS ALL RIGHT WITH THE FAMILY. WE WISH YOU SUCCESS. GREETINGS FROM THE COMRADES. NUMBER 1, 3RD OF DECEMBER.

drop that had been cemented over, was typed on petitioner's typewriter and concealed in a hollowed-out bolt (Exs. 52, 65, 66, 67; R. 548-551, 586-588, 590-598).⁷

In 1954 petitioner received a message from Moscow with orders to locate a Roy A. Rhodes, a Soviet agent known by the cryptonym "Quebec" (R. 394-395). The message described "Quebec" as an American Army sergeant who had been compromised by the Soviets while in Moscow in 1952.⁸ The assignment of locating

⁷ The message read:

"Nobody came to meeting either 8th or 9th at 203 2030 as I was advised he should. Why? Should he be inside or outside? Is time wrong. Place seems right. Please check".

⁸ The typed message on microfilm reads as follows (Ex. 18; R. 536-537; see also Exs. 45, 46, R. 528-530):

Quebec, Roy A. Rhodes, born 1917 in Oilton, [sic] Oklahoma, US, senior sergeant of the War Ministry, former employee of the US Military Attache Staff in our country. He was a chief of the garage of the Embassy.

He was recruited to our service in January 1952 in our country which he left in June 1953; recruited on the basis of compromising materials, but he is tied up to us with his receipts and information he has given in his own handwriting.

He had been trained in code work at the Ministry before he went to work at the Embassy, but as a code worker he was not used by the Embassy.

After he left our country he was to be sent to the school of communications of the Army C-I Service which is at the city of San Luis, California. He was to be trained there as a mechanic of the coding machines.

He fully agreed to continue to cooperate with us in the States or any other country. It was agreed that he was to have written to our Embassy here special letters, but we had received none during the last year.

It has been recently learned that Quebec is living in Red Bank, N. J. where he owns [sic] three garages. The garage job is being done by his wife. His own occupation at present is not known.

His father—Mr. W. A. Rhodes resides in the US. His brother is also in the States where he works as an engineer [sic] at an atomic plant in Camp, Georgia [sic] together with a brother-in-law of his father.

Rhodes was turned over by petitioner to Hayhanen (R. 395-403), who then journeyed to Colorado, telephoned Rhodes' sister, ascertained Rhodes' current address, and reported back to petitioner. Petitioner observed to Hayhanen that Rhodes could be a good agent because some of his relatives were "working on * * * military lands," referring to Rhodes' brother who petitioner believed was "working * * * in some atomic plant" (R. 396-401).

Petitioner stated to Hayhanen that he had received coded radio messages (R. 411) and, on one occasion, in Hayhanen's presence, attempted unsuccessfully to receive short-wave radio signals (R. 383-384). Petitioner also, among other things, instructed Hayhanen to go to Massachusetts where he unsuccessfully tried to locate a Soviet agent named "Olaf" (R. 405-407) and accompanied Hayhanen to Atlantic City in an effort to locate another Soviet agent (R. 407-408). Petitioner also stated that he had received instructions from Moscow to find a good location for an illegal short-wave radio station, which he then endeavored to do (R. 409-411).

In 1955, shortly before returning to Moscow for a visit, petitioner instructed Hayhanen to give \$5,000 to Helen Sobell, wife of a Soviet agent in this country known by the cryptonym "Stone" (R. 412-417). Hayhanen converted the money to his own use (R. 455-456), but reported to Moscow that he had made delivery (R. 416).

After petitioner returned from Moscow in early 1956 (R. 561-565, 726-730) he next met with Hayhanen in the summer of that year and petitioner suggested that Hayhanen might go home to Moscow on leave (R. 424). Subsequently, Hayhanen received a message from Mos-

cow ordering him to return (R. 424-426). Petitioner, in early 1957, gave Hayhanen a fictitious "Oregon birth certificate" in the name of Lauri Arnold Ermas to use in the event he was unable to use his United States passport (R. 427).

Hayhanen left the United States by ship on April 24, 1957 and surrendered himself to American Embassy officials in Paris, on May 4, 1957.

ARGUMENT

Petitioner was convicted by an overwhelming mass of uncontradicted evidence. His contentions as to an unlawful search and seizure, sufficiency of the evidence, and other alleged trial errors, were considered at length by the Court of Appeals, which unanimously affirmed his conviction. There is no occasion for further review by this Court.

1. *The search incident to the arrest.* (a.) Petitioner concedes that he was lawfully arrested under the warrant issued pursuant to 8 U.S.C. § 1252(a) and 8 C.F.R. 242.2(a) (*infra*, p. 27). It is also not disputed that, as we have noted, (*supra*, p. 5, fn. 2), petitioner's failure to notify the Attorney General of his address was a criminal offense under 8 U.S.C. § 1306, as well as grounds for deportation. Because the Government officials concerned determined that petitioner should be arrested under an administrative warrant pending deportation, rather than for the criminal offense, he urges that the I.N.S. agents lacked authority to search the hotel room in which he was arrested, incident to that arrest, for weapons and documents relating to alienage. The contention is without merit.

* Exhibit 19. See also R. 531-532, 537-538, 539-541, and Ex. 47, establishing the fictitious nature of the certificate.

It is well settled that a search may be made incident to a lawful arrest for a crime, with or without a warrant. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56; *Harris v. United States*, 331 U.S. 145. What has been considered crucial is the lawfulness of the arrest—i.e., whether the officers are lawfully on the premises and have lawfully taken the subject into custody—rather than the nature of the offense charged. Petitioner having conceded, as the facts compelled him to do, that his arrest was lawful (R. 126-128), there is no logical basis here for limiting the power to search to arrests for crimes.¹⁰—

Although this Court has never specifically addressed itself to the question whether a search of the person and his immediate surroundings may be made incident to an arrest under an immigration warrant¹¹ there is no rational basis, in this context, for distinguishing between arrests for deportation and arrests for crimes. As the Court of Appeals noted, “deportation, like punishment for crime, as Judge Byers stated below, ‘is initiated in the interests of the United States and for the protection of its citizens.’ * * * the procedure applicable to deportation proceedings, though in some respects different than that applicable to criminal pro-

¹⁰ The fact that the warrant of arrest was administratively issued rather than by judicial process is not significant in the light of this concession. Of course, if the arrest were for any reason unlawful, the search would be invalid regardless of the nature of the underlying offense. In short, in this case, petitioner cannot show how, in this respect, he was in any wise prejudiced by the procedures followed.

¹¹ The only other federal courts which have been presented with the question have sustained the power to search. In *Diogo v. Holland*, 243 F. 2d 571 and *Da Cruz v. Holland*, 241 F. 2d 118, the Third Circuit, in *per curiam* orders, assumed, without discussion, that the power existed. See also, *Taylor v. Fine*, 115 F. Supp. 68; 70 n. 1 (S.D. Cal.) (dictum).

ceedings, see *Carlson v. Landon*, 342 U.S. 524, 537 (1952), is in many ways similar. Arrest and detention are provided for by statute, see 8 U.S.C. § 1252(a), and indeed have been recognized by the Supreme Court as a necessary part of the deportation procedure. *Carlson v. Landon, supra*, at 538." (Pet. 36.) If, as this Court has repeatedly held, the denial of authority to law enforcement officers to conduct a search of the subject and the immediate premises in which he is arrested would too seriously interfere with the proper performance of the officers' duties, then, as the court below stated (Pet. 37), "... * * there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience which justify the former are no less strong in the case of the latter."

It seems clear, therefore, that some authority to search must exist in connection with an arrest on an I.N.S. warrant and, we submit, the reasonableness of the scope of the search must be governed by the same tests which govern the validity of searches conducted incident to arrests for crimes.

(b.) Petitioner consistently has relied for his "lack of good faith" argument, not on the question of the reasonableness of the search as actually conducted by the I.N.S. arresting officers, but on his own inference, contradicted by direct evidence, that I.N.S. made the arrest for the sole benefit of the F.B.I. in furtherance of the latter's counter-intelligence function and for the purpose of uncovering evidence of espionage (Pet. 13-15; and see R. 22-27, 71-72, and Pet. 38-39).

It was principally with this contention that the hearing on the motion to suppress was concerned.

The evidence adduced at the hearing is uncontradicted that the search conducted incident to petitioner's arrest was conducted by I.N.S. officers, not the F.B.I., and the I.N.S. officers testified positively that they searched for (in addition to weapons) documentary materials relating to petitioner's identity and alienage (R. 65, 68, 102, 109, 141, 150). The trial court, expressly addressing its attention to the requirement of "good faith" laid down in *Harris*, 331 U.S. at 153, found the facts to be that there was no effort to enlist petitioner in counter-espionage activity and that the I.N.S. search was conducted in good faith (R. 243-245). This finding, unless it is so unsupported by the record that it is clearly erroneous as a matter of law, should be accepted as conclusive. *Davis v. United States*, 328 U.S. 582, 593; *Harris*, *supra*, at 153. We submit that the finding was amply supported by the evidence and that petitioner's contrary contentions, related solely to the particular facts of this case, do not require review by this Court.

An I.N.S. official testified that he alone made the decision to arrest petitioner for deportation and that his interest was only in petitioner's status as a deportable alien. The arrest was made on the basis of information furnished by the F.B.I., but I.N.S. on its own initiative decided to arrest petitioner pending deportation proceedings. An I.N.S. arresting officer testified that he had not been instructed that the arrest was contingent on Abel's not "cooperating" with the interviewing F.B.I. agents and that he had received no instructions to conduct a search for evidence of espionage. Two I.N.S. arresting officers testified that they had

searched for documents relating to petitioner's illegal status in the United States. On the basis of such testimony the Court of Appeals correctly held that the trial judge was not "bound to reject this direct evidence of good faith and instead base his findings upon the unsupported and contradicted inference which the appellant urges." (Pet. 39.)

2. *The propriety of the seizures.* A total of seven items found in the hotel room which petitioner occupied were introduced in evidence. Of these, five were seized by I.N.S. agents during the search incident to petitioner's arrest, and two were seized after he had checked out of his hotel room with his baggage.¹² Separate legal principles justify the seizure of each group of items.

(a.) Both courts below agreed that four items seized by I.N.S. officers during the search incident to the arrest were the "instrumentalities and means" by which petitioner maintained his illegal status in this country (R. 245; Pet. 41). These were two birth certificates in the names of Emil R. Goldfus and Martin Collins, respectively, the certificate of vaccination in the name of Martin Collins, and the bank book in the name of E. R.

¹² With respect to items not introduced in evidence, petitioner does not contend, and indeed on the facts could not contend, that there was such a general seizure as would be violative of this Court's decision in *Kremen v. United States*, 353 U.S. 346. Petitioner's list of the items "seized" (contained in Exhibit D to his affidavit in support of the motion to suppress) includes the items which petitioner took with him as his baggage when he checked out of his hotel room. (R. 42-45.) The decision to take these items with him, to check out of the hotel room, and to abandon the remaining items, was made by petitioner, not the I.N.S. agents. (R. 167.) At the hearing on the motion to suppress, the bulk of the items listed in this Exhibit were stricken from the motion by stipulation. (R. 79-90.)

Goldfus (see *supra*, p. 6). These documents provided petitioner with the spurious identity which was essential to the maintenance of his illegal status in this country. As such they could properly be seized under the same general principle which permits the seizure, incident to a lawful arrest on criminal charges of, *inter alia*, "the means and instrumentalities by which the crimes charged had been committed." *Harris v. United States*, *supra*, 331 U.S. at 153, 154; *Agnello v. United States*, 269 U.S. 20, 30.

A fifth item found during the search by the I.N.S. officers and introduced in evidence was the code message taken from petitioner's person when he tried secretly to conceal it up his sleeve (see *supra*, p. 6). This message was subject to seizure to prevent the destruction of evidence, *Davis v. United States*, 328 U.S. 582, 609; *United States v. Rabinowitz*, 339 U.S. 56, 72, since it appeared on its face to be an "instrumentality" of the crime of conspiracy to commit espionage (of which crime the arresting officers were aware that petitioner was suspect). Arresting officers need not ignore material related to other crimes which they find on the subject's person during a lawful search. *Harris v. United States*, *supra*, 331 U.S. at 153-155; see, also, *Kelly v. United States*, 197 F. 2d 162, 164 (C.A. 5); *United States v. Braggs*, 189 F. 2d 367, 369 (C.A. 10). In the present case, the seizure of the code message resulted not from any effort of the searching officers to find materials other than documents showing the petitioner's alienage and identity but rather from petitioner's action in attempting to secrete the slips of paper on his person.

(b.) Two items were received in evidence which were seized by agents of the F.B.I. during their later search

of petitioner's vacated hotel room conducted with the written permission of the hotel management (R. 694). These were a cipher book and a hollowed-out pencil containing microfilm ¹³ (Exhs. 87, 88; R. 724-725, 727-731). These items were taken from the wastebasket into which petitioner had deliberately discarded them after he was given the opportunity to decide which property he wanted to pack and keep and which property he wanted to discard or leave behind (R. 109, 114, 663). Moreover, petitioner had permanently vacated the room when the search in which these items were seized was conducted. As the hotel manager testified, once petitioner paid his bill, turned in his key, and took out his baggage, he was no longer entitled to the room, which was then available to be rented to another guest (R. 659-661).

Since petitioner had voluntarily checked out of the hotel room (R. 167), and since the F.B.I.'s search of the room was with the specific consent of the hotel management, there can be no doubt that the search itself was entirely legal. *Davis v. United States, supra*, 328 U.S. at 593-594; *Reszutek v. United States*, 147 F. 2d 142 (C.A. 2). Furthermore, in view of petitioner's abandonment of the items by throwing them into the wastebasket and by checking out of the hotel room in which they were located, he is in no position to claim the protection granted by the Fourth Amendment. Cf. *Hester v. United States*, 265 U.S. 57; *Haerr v. United States*, 240 F. 2d 533, 535 (C.A. 5); *Lee v. United States*, 221 F. 2d 29 (C.A. D.C.); *Newingham v. United States*, 4 F. 2d 490, 493 (C.A. 3).

3. *The sufficiency of the evidence.* Petitioner, citing *United States v. Heine*, 151 F. 2d 813 (C.A. 2),

¹³ Seven "letters" taken from this microfilm were received in evidence as Defense Exhibit F.

certiorari denied, 328 U.S. 833, and *Gorin v. United States*, 312 U.S. 19, argues (Pet. 10-11), in effect, that as a matter of law there was insufficient evidence to permit the jury to find that the information which petitioner conspired to gather and transmit to the U.S.S.R. was information relating to the national defense of the United States which was classified or otherwise unavailable to the public.¹⁴ Despite petitioner's effort (Pet. 11) to cast this issue as a novel legal question all that is really involved is an attack on the sufficiency of the evidence.

However, the evidence overwhelmingly demonstrates that Hayhanen assisted petitioner, a superior officer, in Soviet espionage work in this country; that his specific task was to handle illegal Soviet agents and to gather for the U.S.S.R. secret information pertaining to the national security of the United States; that in pursuit of this task petitioner used false names, communicated with his co-conspirators by means of "drops," coded messages, and short-wave radio; that he purchased rare film specially suited to making "microdots"; and engaged in conduct of a like character.

Petitioner ordered Hayhanen to pay \$5,000 to the wife of a Soviet agent, and on another occasion observed that Sergeant Rhodes ("Quebec") would be a good agent because his brother was working at an American atomic energy installation.

¹⁴ The jury was instructed:

"In order to find the defendant guilty on Counts One and Two, you must find beyond a reasonable doubt that the information which he conspired to obtain and transmit was material relating to the national defense. And this means secret information, information not available to the public upon request." (R. 820.)

Petitioner was also shown to possess (in addition to the false identification papers, code message, pencil containers and cipher pad which were seized at the hotel room) the following classic implements of an espionage agent: a coded message, scotch-taped to the page of a book, apparently for purposes of photographing the same (Ex. 90; R. 696); two screws, one battery, one cuff link, and three tie clasps, all of which had been fashioned into "containers" with cavities large enough for the concealment of microfilm and other secret messages (Exs. 91, 91A, 92, 94, 95, 96; R. 700, 701, 722-723).¹⁵

As the Court of Appeals aptly stated (Pet. 47):

[T]he jury cannot have failed to be impressed by the elaborate precautions taken by the conspirators to keep their activities secret. Men intent upon gathering and transmitting only such information as is available to the general public do not ordinarily find it necessary to employ secret codes, microdots, hollowed-out coins, pencils, or matchbooks; "drops"; and the variety of other devices which Abel and his colleagues used.

Clearly there is no need for further examination by this Court of the sufficiency of the evidence so carefully reviewed by the court below.

4. *The conduct of the trial.* Finally, petitioner engages in a general attack upon a wide variety of alleged

¹⁵ Following the return of the indictment in this case, F.B.I. agents on August 16, 1957 secured a search warrant for a storage room used by petitioner. These items were seized under the search warrant on August 17, 1957 (R. 262-274, 695-701). An earlier search warrant for petitioner's studio was executed on June 29, 1957 (R. 247-261). But none of the items seized pursuant to this warrant was offered or received in evidence at the trial.

prejudicial errors in the conduct of the trial (Pet. 12-13, 16-22). Practically every claim of error is completely without merit; the others are mere *minutiae*, inevitable in any lengthy trial. But in no sense can the conduct of the trial be said to have resulted in such prejudice to petitioner that the affirmance of the conviction by the Court of Appeals requires review by this Court.

(a.) Petitioner attacks (Pet. 12) the admission of certain testimony which corroborated and amplified the testimony of an accomplice of the petitioner (Hayhanen) but which of necessity admitted certain criminal conduct on the part of the witness. Presumably this attack refers to the testimony of Sergeant Rhodes. As noted by the Court of Appeals, however, "the issue is not so much one of law as it is one of logic." (Pet. 51.) Both courts below, reviewing the particular facts and circumstances of this case, determined that the evidence was relevant and helpful.

Rhodes' testimony corroborated Hayhanen's in two vital aspects.¹⁶ First, Hayhanen testified that petitioner had been instructed by Moscow to find Rhodes and that petitioner was anxious to do so. Rhodes' testimony supported this by establishing his own existence and by providing positive, direct evidence of the motive for locating him, *viz.*, his usefulness in Soviet espionage, as manifested by his past cooperation. Second, Hayhanen testified that petitioner was interested in Rhodes because of his access to secret military information, thus establishing that it was espionage activity in which petitioner was engaged. This

¹⁶ Vigorous efforts have been made on cross-examination to impeach Hayhanen's credibility (R. 488-500). Indeed petitioner as-

was supported by Rhodes' testimony as to his past activities.

Thus, Rhodes' testimony not only supported and amplified Hayhanen's as to this matter and established an additional logical link between petitioner and the Soviet espionage system, but also tended to support a strong inference that Hayhanen was a trustworthy witness and that the remainder of his story was true. Given this importance and relevance of the Rhodes testimony, it can hardly be said to have been reversible error to admit it, even though it happened to involve an admission by the witness of a dishonorable and illegal role in the system with which petitioner was associated.

(b.) Petitioner also complains (Pet. 12) of allegedly prejudicial surplusage in the indictment. Here again petitioner is attacking a proper exercise of discretion on the part of the trial court. Two counts of the indictment included an allegation that petitioner and his co-conspirators "in the event of war . . . would engage in acts of sabotage against the United States." (R. 10, 16.) It is submitted that this allegation was relevant to establish a specific intent that the information which it was the object of the conspiracy to gather would be used to the advantage of the Soviet Union. The Court of Appeals agreed with petitioner that the allegation was surplusage, but ruled that it could not have been prejudicial, since "there was no testimony in the case concerning sabotage or a conspiracy to commit sabotage, and the jury was carefully instructed by

serts (Pet. 4) that Hayhanen was thoroughly discredited. The jury, instructed that Hayhanen's testimony was the only testimony relating to the membership and purpose of the conspiracy (R. 810-811), obviously thought otherwise.

the trial judge that the indictment was not evidence and was not to be considered by them as evidence" (Pet. 52-53).

Moreover, the defense did not request the trial judge to instruct the jury further as to the significance of this allegation in the indictment.

(c.) As to the remaining errors alleged by petitioner—the alleged use of leading questions in examining Hayhanen (Pet. 17-20) and the general "conduct of trial" (Pet. 20-22)—the Government's position is well summarized by the Court of Appeals, which in discussing this point stated (Pet. 53):

No purpose would be served by a detailed discussion of these alleged improprieties. As to some we do not find that any error was committed; others were matters within the discretion of the trial judge, who, in our opinion, did not abuse that discretion; and as to the remainder we think that the alleged errors were not so prejudicial as to require a new trial in this case where the "record fairly shrieks the guilt" of the accused. *Lufwak v. United States*, 344 U.S. 604, 619 (1953).

We submit that even if this Court looks only to those specific instances upon which petitioner relies—taking them out of the context of a record which, as a whole, clearly manifests the fairness with which the trial was conducted—it will nevertheless be apparent that both courts below were clearly justified in holding that petitioner was afforded a fair trial.¹⁷

¹⁷ For example, petitioner claims (Pet. 18) that "[t]he sole testimony in the case relating to national defense information was extracted from the witness in this way [by leading questions] (313,

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1958.

314) and misquoted back to the witness likewise (315, line 20). The record references which petitioner offers in support of the former of these assertions—R. 313, 314—reflect, quite to the contrary of petitioner's charge, that the questions asked of Hayhanen on this subject were entirely proper non-leading inquiries, and, in any event, were not objected to. And Hayhanen's testimony was not "misquoted back" to him, as petitioner further charges. (Compare the record reference which petitioner cites for this assertion—R. 315, line 20—with R. 314, line 11.)

APPENDIX

8 U.S.C. 1103(a), 1251(a)(5), 1252(a), 1305, and 1306 provide in pertinent part as follows:

§ 1103. Powers and duties of the Attorney General and Commissioner; appointment and compensation of Commissioner.

(a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers * * * He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. * * *

§ 1251. Deportable aliens—(a). General classes.

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * * *

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful. * * *

§ 1252. Apprehension and deportation of aliens—
(a) Arrest and custody; review of determination by court.

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. * * *

§ 1305. Change of address.

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. * * *

§ 1306. Penalties—(a) Willful failure to register.

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, * * * shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both. *

8 C.F.R: 242.2(a) provides in pertinent part as follows:

At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to supervision under the authority contained in section 242(d) of the act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest issued by a district director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. * * *

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No. [REDACTED]

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Office Supreme Court, U.S.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins, and Emil R. Goldfus,
Petitioner,

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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September 15, 1958.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 263

RUDOLF IVANOVICH ABEL, also known as "Mark" and also
known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

REPLY BRIEF FOR PETITIONER.

The brief for the United States in opposition to this petition avoids and does not meet the principal points urged by Petitioner.

We respectfully submit that it remains clear that the court below has decided important questions of federal law which this Court has not decided but should settle; that the court below decided other important federal questions contrary to established decisions of this Court; and that the court below has so far sanctioned a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Facts.

Petitioner points out a few areas wherein the Court could be misled by the facts as stated in the Government's brief.

1. The Articles Seized.

In discussing the "propriety of the seizures" in Petitioner's hotel room when he was taken into custody for deportation on June 21, 1957 the Government brief creates the impression that I. N. S. agents there discovered four items relating to alienage and that these items, plus one other, were the only items then seized by I. N. S. agents which were used in the espionage case. This impression can mislead the Court, as it did the court below ("Opinion of Court," Our Brief, Appendix A, p. 41):

The I. N. S. agents conducted only a "superficial examination" of Abel's personal effects at the time of the arrest (103).^{*} They seized all his possessions, over 200 items (37-46, 68), and took them to I. N. S. headquarters (69). See *Kremen v. United States*, 353 U. S. 346 (1957).

At I. N. S. headquarters a thorough search of the 200 items was conducted by the F. B. I. and I. N. S. (48, 54, 60) and it was then that 1) the Emil Goldfus birth certificate, 2) the international certificate of vaccination, and 3) the East River Savings Bank book were discovered to be among the over 200 items seized (668-669). The F. B. I. agents also found and used from among the 200 items at least another 10, in no way connected with alienage, to obtain a search warrant a week later (48-59). Based on this search warrant, the F. B. I. obtained at least 9 exhibits and the testimony of two witnesses for use at the trial (Our Petition, Appendix "D", p. 62).

^{*} Unless otherwise indicated, parenthetical page references are to the separately printed Joint Appendix in the court below.

In addition, the F. B. I. used other items seized and unrelated to alienage, such as "3 Bills from Broadway Central and 3 Bills from Datona Plaza" (45), to procure evidence used at the trial (636, 635-6, 713-4). In all, the seizure of all Petitioner's possessions and the subsequent search of them resulted in at least 35 exhibits and the testimony of 7 witnesses at the trial. (See Petition, Appendix "D".)

2. "Good Faith" of the Department of Justice.

In discussing the "good faith" of the Department of Justice in making the search at the Hotel Latham, the Government brief has minimized the role played by the F. B. I. This should be irrelevant, of course, since I. N. S. and the F. B. I. are both component parts of the Department of Justice, subject to the Attorney General. (See Reorganization Plan No. 2 of 1950, 15 F. R. 3173, 64 Stat. 1261.) However, the facts should be correctly presented to the Court.

To minimize the F. B. I. role, the Government has had to rely heavily on the testimony of an I. N. S. official named Note (Their Brief, pp. 4; 5). The record shows that Mr. Noto unfortunately could not recall many events that happened during June, 1957, as is readily apparent from the testimony of the other Government agents and the report of an interview with General Swing. He did recall, however, being told by the F. B. I. that Petitioner's true name was Abel (201, 204) well before the F. B. I. agents or anyone else investigating the case discovered such to be the fact or ever heard of the name (174, 289, 56, 57).

Some of the facts concerning the F. B. I. participation in Petitioner's detention, which the Government brief omitted, are as follows:

On June 19, 1957 at 3:00 or 4:00 o'clock in the afternoon, three I. N. S. officials met with four F. B. I. agents at the F. B. I. headquarters in Washington (158-160). During the two hours they were there, the I. N. S. agents were given an F. B. I. report and were instructed to and did prepare an Immigration detention warrant, take it to New York and call F. B. I. headquarters there (96, 124-5, 132, 161-5).

Around midnight that night four I. N. S. agents met with eight F. B. I. agents at F. B. I. headquarters in New York, having with them the warrant which had been signed as a matter of form by the I. N. S. District Director in New York (97-99, 134). The I. N. S. agents spent the night at F. B. I. headquarters and proceeded in the morning in F. B. I. cars to the Petitioner's hotel, where six F. B. I. agents were waiting for them (100-101, 137).

Three F. B. I. agents entered Petitioner's hotel room about 7:00 A. M., July 21, 1957 (175-177). Their instructions were to solicit his cooperation (175). If he did cooperate they were to call their F. B. I. superior (184-5). If he did not, they were to direct the I. N. S. agents to arrest him (185). The F. B. I. agents informed Petitioner that his arrest was contingent on whether or not he cooperated (183-5, 188). The I. N. S. agents had agreed with the F. B. I. to arrest Petitioner only if he did not cooperate with the F. B. I. (191).

The F. B. I. agents signalled the I. N. S. agents to proceed with the arrest (138, 190). The F. B. I. remained present, procured the hotel bill and paid the bill (69, 144-146, 190, 703). F. B. I. agents conducted their own search and seizure after Petitioner was removed from the hotel and later examined all the items I. N. S. had seized there (48, 54, 70, 694). They used a large number of the items seized by I. N. S. to build their espionage case. (See "1" above.) Two of the F. B. I. agents then flew to an isolated

détention center in Texas (to which F. N. S. was deporting Petitioner) and immediately resumed soliciting his cooperation (30, 60).

Counter-Espionage.

The Government asserts that the trial court found that no effort had been made to enlist Petitioner in counter-espionage (Govt. Brief, p. 16). Actually Judge Byers stated only that F. B. I. agent Blasco's testimony did not indicate that such an effort had been made (244). But see Pages 175, 183, 191.

The only evidence on this point, in addition to the unique circumstances surrounding Petitioner's detention and subsequent deportation to Texas, comes from two sources: a) the Petitioner and b) F. B. I. agent Blasco. The Petitioner swore in his original affidavit that in addition to soliciting his cooperation in New York, while in Texas "They [the F. B. I.] stated over and over again that [if I would cooperate] they would get me good food, liquor, an air-conditioned room in a Texas hotel, and that they could assure me a job eventually with another Government agency." (31) This statement has never been denied, refuted or indeed mentioned by the Government. Apparently, like the F. B. I.'s explanation of its regular "clandestine" searches (Petition, pp. 13-15), the least embarrassing way for the Government to deal with it lies in ignoring its existence.

3. Petitioner's "Voluntary" Acts.

The Government blandly states that Petitioner "voluntarily checked out of the hotel room" and "abandoned" items he threw in the wastepaper basket (Their Brief, p. 19). We simply point out that these so-called voluntary acts were performed while Petitioner, surrounded by armed

Government agents and "under arrest," was being made ready for removal in handcuffs from the hotel by a rear door, for a special flight with guards to a remote cell in Texas. (See 119.)

4. Testimony of Sergeant Rhodes.

The Court will note that neither the Circuit Court in its opinion, nor the Government in its present brief, has attempted to support the admission of Sergeant Rhodes' testimony by the citation of legal precedent or other authority. The conclusion is inescapable that the admission of such irrelevant and prejudicial testimony has never been sanctioned by a decision of this Court or indeed by any other court of last resort.

To permit the decision below to remain a rule of evidence in federal conspiracy cases, is to condone a substantial erosion of the basic concepts of proper evidence under Anglo-Saxon law.

Conclusion.

The points made in our petition are valid and remain unshaken. This case presents significant issues affecting the personal rights and liberties of all in the nation.

The petition for a writ of certiorari should be granted.

Dated, September 15, 1958.

Respectfully submitted,

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To be argued by

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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November 25, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 263.

RUDOLF IVANOVICH ABEL, also known as "Mark" and also
known as Martin Collins and Emil R. Goldfns,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals (R. 837-865) is reported at 258 F. 2d 485. The opinion of the United States District Court for the Eastern District of New York (R. 239-246) is reported at 155 F. Supp. 8.

Jurisdiction.

The judgment of the Court of Appeals was entered on July 11, 1958 (R. 865). The petition for a writ of certiorari

was filed on August 8, 1958 and was granted, with respect to two questions, on October 13, 1958 (R. 866). The jurisdiction of this Court is based upon 28 U. S. C. 1254(1).

Questions Presented.

1. Whether the Fourth Amendment to the Constitution of the United States is violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Deportation Warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?

Constitutional and Statutory Provisions.

The constitutional and statutory provisions involved are Amendments IV and V to the Constitution of the United States; 18 U. S. C. 794 ("Gathering or delivering defense information to aid a foreign government"); 18 U. S. C. 793 ("Gathering, transmitting or losing defense information"); 18 U. S. C. 951 ("Agents of foreign governments"); and 18 U. S. C. 371 ("Conspiring"). All are printed in Appendix "A" to this brief; *infra*, pp. 32 to 37.

Statement.

Petitioner was indicted on August 7, 1957 in the Eastern District of New York upon charges of conspiring to commit espionage on behalf of Soviet Russia. Three separate counts charged conspiracies to violate 18 U. S. G. 794, 793 and 951 (R. 7-19).

Following a jury trial before Hon. Mortimer W. Byers, D. J., petitioner, the only defendant, was convicted on all counts. On November 15, 1957 he was sentenced to thirty years imprisonment and fined \$3,000 (R. 829, 834). The Court of Appeals for the Second Circuit affirmed his conviction on July 11, 1958 (R. 865). On October 13, 1958 this Court granted a petition for a writ of certiorari to the Court of Appeals, with respect to two questions pertaining to an alleged violation of petitioner's rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 866).

The Facts.

All facts in the following narrative are taken exclusively from statements by U. S. Government officials and witnesses, or were uncontradicted in the proceedings below.

A. Investigation of Hayhanen and Abel by F. B.I.

Petitioner is a man called Abel, who for some years maintained an artist's studio on Brooklyn Heights while living in New York at various inexpensive lodgings (R. 543, 545, 633-636). Apart from the instant charges, his reputation for honesty and integrity has been characterized by American friends and neighbors as "beyond reproach" (R. 553, 568, 711).

4

In early May, 1957 one Reino Hayhanen informed the American Embassy in Paris that since 1952 he had been acting in the United States as a secret espionage agent for the U. S. S. R. and that since 1954 he had assisted here a Soviet espionage one "Mark", whose true name he did not know but whom he identified at the trial as the petitioner Rudolf Ivanovich Abel (R. 439-444, 289, 377). According to Hayhanen, the man was the "resident agent" in the United States with the military rank of Colonel (R. 289, 290, 310).

Based upon Hayhanen's story, F. B. I. agents immediately commenced an intensive investigation of the alleged espionage activities of Abel, shadowing him, watching his studio in Brooklyn and occupying the hotel room next to his at the Hotel Latham in Manhattan (R. 56, 137-138, 644-657). During this period (May-June 20, 1957) the agents obtained through Hayhanen testimony and numerous exhibits which were later introduced as evidence of espionage at Abel's trial. See Appendix "B" to this brief, "Evidence of Espionage Obtained by the Department of Justice Prior to Abel's Detention for Deportation on June 21, 1957" *infra*, pp. 38-40. However, Hayhanen was not arrested, nor did the Department of Justice seek to obtain a warrant of arrest or a search warrant relating to Abel.

B. Preparations for Solicitation of Abel by F. B. I.

On June 20, 1957 at 3:00 or 4:00 o'clock in the afternoon, three Immigration and Naturalization Service agents met with four F. B. I. agents at the F. B. I. headquarters in Washington (R. 158-160). During the two hours they were there, the I. N. S. agents were given an F. B. I. report on Abel as a suspected Soviet spy; they also were instructed to and did prepare an Immigration detention warrant, take

it to New York and call F. B. I. headquarters there (R. 92, 96, 124-5; 132, 161-5). [The substance of the F. B. I. report has been requested by, but remains unknown to, the defense (R. 133, 152-157). It is part of the Record in this Court, under seal (236-238)].

Around midnight that night four I. N. S. agents met with eight F. B. I. agents at F. B. I. headquarters in New York, having with them the detention warrant which now had been formally signed by the I. N. S. District Director in New York (R. 97-99, 134). The I. N. S. agents spent the night at F. B. I. headquarters and proceeded early next morning in F. B. I. cars to the Hotel Latham, where Abel was living. There six F. B. I. agents were waiting for them; the F. B. I. had previously taken occupancy of the room adjoining 839, in which Abel lived (R. 100-101, 137).

The F. B. I. agents had been instructed to "solicit" Abel's "cooperation" with respect to his activities (R. 175). If he did cooperate, they were to call their F. B. I. superior in New York and "relate to him the degree of cooperation being exhibited" (R. 184-5). If he refused to cooperate, they were to direct the I. N. S. agents to arrest him (R. 185). The I. N. S. agents had agreed with the F. B. I. to take Abel into custody only if he did not cooperate with the F. B. I. (R. 191).

C. Unsuccessful Solicitation of Abel by F. B. I.

About 7:00 A. M. that morning (June 21, 1957) F. B. I. Agents Gamber and Blasco knocked on Abel's door and "pushed" into the room (R. 175). Abel was naked (R. 176). Shortly thereafter F. B. I. Agent Phelan joined them (R. 177). They explained the counter-espionage jurisdiction of the F. B. I. and stated that their purpose in questioning him was concerning such matters (R. 179-180). They said: "Colonel, we have received information concerning your

"involvement in espionage" (R. 183-184). For approximately a half-hour they unsuccessfully attempted to question Abel about his activities in the United States, calling him "Colonel" (R. 182-3). He was not warned of his constitutional rights, because the F. B. I. regarded the meeting as "an interview to solicit his cooperation" (R. 185-187), but was told that if he failed to cooperate "he would be placed under arrest prior to leaving the room" (R. 183).

D. Detention by I. N. S. "For Deportation"; the Searches and Seizures.

Shortly after 7:30 a. m. the F. B. I. agents recognized the futility of further discussion at that time. One left the room and motioned to the waiting I. N. S. officers to serve their detention warrant and take Abel into custody (R. 139-140, 189-190). The officers did so and then proceeded, in the presence of the F. B. I. agents, to pack up all Abel's personal effects in the room (R. 65, 68). They found no weapons or "evidence of alienage" (R. 142, 150) but seized over 200 items belonging to Abel (R. 31, 37-45). A list of the items seized by the I. N. S. agents at that time which were later introduced as evidence at Abel's espionage trial, or were used to obtain exhibits introduced at the trial, is set forth in Appendix "C" to this brief, *infra*, pp. 41-45.

Subsequently that day the over 200 items seized by Immigration officers were "displayed to Special Agents of the Federal Bureau of Investigation" and more thoroughly searched at Immigration Headquarters (R. 48, 54, 59-60, 669). On the basis of some of the items so seized by Immigration officers, but which were not used at the trial, F. B. I. agents then obtained two search warrants (R. 47-55, 247-274) relating to Abel's studio in Brooklyn. There more than 300 other items were seized, some of which were used at the trial as set forth in Appendix "C" hereto, *infra*, pp. 44-45.

After the Immigration officers had taken Abel into custody at the Latham, an F. B. I. agent obtained money from him and "checked him out" down at the hotel desk (R. 144, 703). His rent so paid entitled him to possession of the room until 3:00 p. m. that afternoon (R. 660). However, shortly after Abel was removed from the hotel, by a back door in handcuffs, F. B. I. agents with permission from the hotel owner conducted another search of Abel's room. The F. B. I. at that time seized over 30 additional items (R. 46, 693-695), 5 of which were introduced as Government exhibits at Abel's espionage trial (G. Ex. 87, 88, R. 694, 724, 726; G. Ex. 97, 98, 98A; R. 727-731). The Government has contended that these items were not illegally seized because, by being checked out of the room, Abel had "voluntarily abandoned them." However, no consent by Abel to any search was sought or obtained (R. 166, 705).

**E. Deportation to Texas for Further Solicitation
by F. B. I. and Interrogation.**

When Abel was taken into custody at the Latham, he was given a copy of a "Warrant for Arrest of Alien" and an "Order to Show Cause and Notice of Hearing", which stated that he would have a hearing, for deportation from the United States, before the District Director of I. N. S. at its New York headquarters, 70 Columbus Avenue, New York City at 2:30 p. m. on July 1, 1957 (R. 33-35).

However, after leaving the Latham Abel was taken to the I. N. S. headquarters, fingerprinted and then driven to an airport in Newark, New Jersey where he was placed on a special plane. He and two Immigration agents were the only passengers and he was not told his destination (R. 30). After a thirteen-hour flight they arrived at a maximum security camp for aliens at McAllen, Texas where he was placed in a solitary cell (R. 30, 60).

F. B. I. agents (including Gamber and Blasco, who had questioned him at the Latham) and I. N. S. officers immediately began an interrogation of Abel that lasted approximately four weeks (R. 30, 31, 60). On the third day of questioning, Abel stated that he was a Russian citizen illegally in this country; he then was permitted to see counsel and was given a deportation hearing in the prison by I. N. S. (R. 61). At his own election he was ordered deported to the U. S. S. R., on June 27, 1957 (R. 31, 689-693). The F. B. I. interrogation continued thereafter for several weeks; although Abel was offered by the F. B. I. a government job and other inducements, he continued to refuse to "cooperate" (R. 31).

F. Return to Brooklyn for Trial.

On August 7, 1957 Abel learned in his Texas cell that he had been indicted in Brooklyn on charges of Soviet espionage, including the capital offense of conspiring to transmit national defense information (R. 32). That day, for the first time, a criminal warrant for his arrest was issued and Abel for the first time was taken before a court. No warrant to search his room at the Latham or to seize the articles found therein, has ever been issued.

Following the denial of various defense motions, Abel was ordered to trial on October 3, 1957. A jury was picked, then excused for a week granted defense counsel to prepare for trial. A hearing on Abel's motion to suppress the Latham evidence was held during this week.

At the trial, over timely objections by defense counsel, evidence obtained as a result of the Latham seizure was introduced (see schedules in Appendix "C" to this Brief, *infra*, pp. 41-45). The jury thereafter returned its verdict of guilty on all counts in the indictment (R. 821).

Summary of Argument.

Counsel respectfully urge that the judgment below must be reversed because fundamental rights guaranteed to all under the Fourth and Fifth Amendments to the Constitution have been denied to petitioner.

On June 20, 1957 the Department of Justice had testimony and corroborating evidence which would give a reasonable person probable cause to believe that Abel was a Soviet espionage agent (see Appendix "B" hereto *infra*, pp. 38-40). Instead of obtaining a warrant for his arrest and a search warrant (which would have required prompt public disclosure of his seizure) the Department of Justice resorted to a subterfuge, in a gamble that Abel could be persuaded to cooperate with the F. B. I.

By pre-arrangement with the F. B. I., the Immigration Service issued an administrative order, unsupported by oath or affirmation and returnable to themselves, for Abel's detention for deportation, agreeing that it would not be served except at the direction of the F. B. I. Meanwhile, all plans were made to have Abel and his effects vanish from public knowledge if he refused to "cooperate" with the F. B. I. Both agencies (F. B. I. and I. N. S.) are component parts of the Department of Justice.

On the morning of June 21, 1957, the plan was put into effect. The F. B. I. without any process raided Abel's hotel room and for a half-hour solicited his "cooperation". He refused to answer their questions. He and all his effects then were seized by I. N. S. officers, waiting outside for the F. B. I. signal. He was removed from the hotel by a back door and after fingerprinting he was placed on a special plane, flown to a remote Texas prison and placed in a solitary cell. After three days of questioning by F. B. I.

and I. N. S., he saw a lawyer, received a brief deportation hearing in the prison and elected to be deported to the U. S. S. R. For weeks following, he steadfastly refused to "cooperate". Meanwhile, all his effects had been thoroughly searched in New York by the F. B. I. and I. N. S. On August 7, 1957 he was indicted in Brooklyn on the capital offense of conspiring to steal national defense secrets. He was convicted after a trial in which evidence obtained as a result of the Latham seizure was used against him. (See Appendix "C" hereto, *infra*, pp. 41-45.)

Such a search and seizure, lacking what this Court has called "good faith", violates the Fourth Amendment under the reasoning of both the majority and the minority of the Court in *Harris v. United States*, 331 U. S. 145 (1947). The use of a subterfuge, equivalent to stealth, is forbidden under similar principles. *Gouled v. United States*, 255 U. S. 298 (1921). Moreover, in the case at bar, almost all the items seized for later search cannot even be claimed to relate to the Immigration warrant. *Kremen v. United States*; 353 U. S. 346 (1957); *Harris v. United States*, *supra*.

But even more fundamental, we contend, is the rule applicable to the case at bar that although a person is suspected of being an alien illegally in the United States he cannot be subjected to a general search and seizure, and thereafter prosecuted for a crime on evidence so obtained, unless the search and seizure conform to the requirements of the Fourth Amendment. In the instant case the administrative process employed by the Government lacked all the safeguards required by the Amendment. *Nathanson v. United States*, 290 U. S. 41 (1933); *cf. Giordenello v. United States*, 357 U. S. 480 (1958).

ARGUMENT.

I.

The Fourth Amendment was violated when the Department of Justice, pursuing a counter-espionage objective, searched and seized a suspected espionage agent and his effects by the subterfuge of an alien detention warrant, instead of arresting the suspect for the commission of a crime and otherwise proceeding with due process of law.

"Freedom under law is like the air we breathe. People take it for granted and are unaware of it—until they are deprived of it. The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law. The dread knock on the door in the middle of the night . . ."

DWIGHT D. EISENHOWER, "U. S. Law Day" Address, May 1, 1958.

"Time", May 5, 1958, p. 11.

To understand what occurred in Room 839 of the Hotel Latham on the morning of June 21, 1957 it is essential to bear in mind that the Federal Bureau of Investigation has two distinct functions. First, it is a law enforcement or police agency and second, it is a component part of our national intelligence forces dealing with internal security and counter-espionage in the United States. Compare 5 U. S. C. 299, with 5 U. S. C. 300; 50 U. S. C. 403 (a)(e);

Its internal security function is recognized as such by the F. B. I. (R. 179, 180, 195) and its procedures are governed accordingly. In the virtually official "The F. B. I.

Story" by Whitehead (1956) the Foreword is by J. Edgar Hoover, Director of the F. B. I., who states therein that (a) the F. B. I. has "complete confidence in his (the author's) integrity, ability and objectivity", and (b) "the facts reported are supported by the Bureau's record." In "The F. B. I. Story" the author states (R. 63-64):

"The F. B. I. conducts two types of security investigations—one to uncover admissible evidence to be used in the prosecution of an individual or group in federal court, the other for intelligence purposes only. The intelligence investigation is intended to identify and determine the activities of individuals who are potentially dangerous to the nation's security, thereby supplying information on which to base preventive or counterespionage action. Often clandestine methods are necessary to uncover clandestine operations, as for example, obtaining an espionage agent's diary or secret papers. The evidence in the diary may be inadmissible in federal court, but it may contain information which would enable the United States to protect itself at a later date. This is in contrast to a case where legal evidence, admissible in court, has to be obtained to convict the espionage agent of violating the laws of the United States."

It has been our contention that such a "clandestine method"* is a precise description of what the Department of Justice attempted in this case. We have not criticized their calculated gamble to grab Abel and his effects, keep his seizure secret as long as possible, and try to persuade him to aid the United States. We stated in the courts below

* "Clandestine, adj. Conducted with secrecy by design, usually for an evil or illicit purpose." Webster's International Dictionary, 2d Ed., (1950).

that from a counter-espionage viewpoint, the decision seems prospectively sound (R. 25, 26). But we maintain that the Department of Justice, having elected to gamble that Abel would "cooperate" and then having lost, cannot subsequently seek to reverse its steps, prosecute Abel on evidence "inadmissible in federal court" and pay lip service to due process of law.

The point was over-ruled by the courts below, the District Judge commenting during the hearing: "I think it is the job of the F. B. I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function" (R. 131).

With this background we may recapitulate the pertinent facts and understand their true significance in relation to the issues before this Court.

**1. Investigation of Hayhanen and Abel by F. B. I.;
the Decision on June 20, 1957.**

We have noted that in early May, 1957 Hayhanen informed the American Embassy in Paris that since 1952 he had been acting in the United States as an intelligence agent for the U. S. S. R. and that since 1954 he had assisted here in Soviet espionage one "Mark" whom he later identified as Abel (R. 439-444, 289, 377, 488). Based upon his story, the F. B. I. promptly commenced an intensive investigation of the alleged espionage, watching Abel's Brooklyn studio, shadowing him and occupying the hotel room next to his at the Hotel Latham in Manhattan (R. 56, 137-138, 644-657). Hayhanen meanwhile was "cooperating" in New York and had directed the F. B. I. to various espionage materials which he accused Abel of having given to him (R. 445; 446, 507-525, 582-586).

Thus in June, 1957 the Department of Justice possessed substantial evidence that in Room 839 of the Latham lived an undercover director of Soviet espionage in the United States, who had illegally entered the country. The Department—and any reasonable person—accordingly had probable cause to believe that various federal crimes had been committed by the occupant of Room 839 and that legal warrants for his arrest and a search could be obtained. See Appendix "B", *infra*, pp. 38-40. *Brinegar v. United States*, 338 U. S. 160 (1949); *Johnson v. United States*, 333 U. S. 10 (1948).

However, the Department also knew that the accomplice Hayhanen had already "cooperated" with our counter-espionage agencies and that it was possible that the man in Room 839, after many years in the United States, might follow a similar course. According to Hayhanen, the man was the "resident agent" with the high military rank of Colonel (R. 289, 290, 310). If he could be induced to "cooperate", a remarkable coup in counter-espionage would be possible: at the minimum, complete knowledge of a major Soviet spy apparatus in the United States, with names of its agents and sources, keys to ciphers, etc.; at the maximum, creation of an important "double agent" who for an indefinite period could mislead and disrupt Soviet intelligence (affecting military and foreign policy decisions of the U. S. S. R.) while secretly serving the United States.

A decision on the highest policy level had to be made by the Department of Justice, with respect to the man in Room 839:

- (1) Should the Department, as a law enforcement agency, obtain a warrant for his arrest on espionage or other criminal charges, and also a search warrant? If so, the man could be seized and his room searched but he would have to be publicly

brought before the nearest available U. S. Commissioner or Federal Judge "without unnecessary delay", be entitled to consult counsel at once, and then be remanded to a federal prison.

(2) On the other hand, would it be more in the national interest for the Department, exercising its counter-espionage functions, to seize the man and his effects in a clandestine manner, conceal his capture from his co-conspirators as long as possible, and meanwhile seek to induce him to come over to our side?

The final decision was made on June 20, 1957. At the request of our counter-intelligence agencies (R. 75, 76, 163, 164) and by orders from Washington, local Immigration officials in New York that night signed a "warrant of arrest" and "order to show cause" returnable to themselves and previously prepared in Washington (R. 33-37, 95-96, 163). They agreed that the papers would be served only if Abel refused to "cooperate" with the F. B. I. (R. 184, 185, 188, 191). A decision had been made to institute deportation proceedings and not to prosecute criminally for illegal entry, at that time (R. 218-220).

Immigration and Naturalization Service of course is a component part of the Department of Justice, as is the Federal Bureau of Investigation, both being under the Attorney General. See Reorganization Plan No. 2 of 1950, 15 F. R. 3173, 64 Stat. 1261.

2. Unsuccessful Solicitation of Abel by F. B. I.

At approximately 7:00 a. m. on the morning of June 21, 1957 F. B. I. and Immigration agents, acting in unison according to a prearranged plan (R. 136-138, 165) surrounded Room 839 in the Latham. Two F. B. I. agents knocked on the door and, when Abel opened it, "pushed" into the room (R. 175). Abel was naked (R. 176). Shortly

thereafter, a third F. B. I. agent entered the room (R. 177). They explained the internal security jurisdiction of the F. B. I. and stated that their purpose in questioning him was concerning such matters (R. 179, 180). They said: "Colonel, we have received information concerning your involvement in espionage" (R. 183-184). For approximately a half-hour they questioned Abel about his activities in the United States, addressing him as "Colonel" (R. 178, 182, 183). He refused to "cooperate", although cooperation was "solicited" (R. 183). He was not warned of his constitutional rights, because the F. B. I. regarded the meeting as "an interview to solicit his cooperation" (R. 185-188), but was told that if he failed to cooperate "he would be placed under arrest prior to leaving the room" (R. 183).

The F. B. I. has no operative jurisdiction with respect to illegal residence in the United States (R. 194).

3. Detention "for Deportation" by I. N. S.; the Searches and Seizures.

Shortly after 7:30 a. m. the F. B. I. agents recognized the futility of further solicitation at that time. One left the room and motioned to the waiting Immigration officers to arrest Abel (R. 139-140, 189-190). The Immigration officers did so and then proceeded, in the presence of the F. B. I. agents (R. 59, 142, 190) to seize all Abel's personal effects in the room. At the hearing below, the Immigration officers testified that they were looking for weapons and "evidence of alienage" (R. 65, 68) but admitted that they found none (R. 37-46, 142, 150).

Abel occupied Room 839 by the week and the rent was due the next day (R. 659). An F. B. I. agent took money from Abel and "checked him out" down at the hotel desk (R. 144, 703). Even so, his rent was paid so that he was entitled to possession of the room until 3:00 p. m. that

afternoon (R. 660). After Abel's effects were packed, he was handcuffed and taken out a rear door of the hotel at approximately 8:00 a. m. (R. 109, 118). In a waiting car he was driven to local Immigration headquarters for fingerprinting and then was taken to Newark Airport. Meanwhile, his effects were being more thoroughly searched by F. B. I. and I. N. S. at Immigration headquarters (R. 48, 54, 59-60, 669).

Shortly after Abel was removed from the Latham, at about 9:00 a. m. (R. 660) F. B. I. agents obtained the key to Room 839 from the hotel desk, returned to the room for another search, and seized various objects (R. 693-695). Based upon the foregoing searches (R. 47, 53, 248, 265) the F. B. I. subsequently obtained two search warrants relating to the Brooklyn Heights studio (R. 247, 262). No consent by Abel to any search was sought or obtained (R. 166, 705).

4. The Deportation to Texas for Further Solicitation by F. B. I. and Interrogation.

At approximately 4:15 p. m. that day Abel departed from Newark Airport in a special plane, guarded by two Immigration agents (R. 30, 60). Thirteen hours later he arrived in McAllen, Texas, where he was placed in segregated confinement within "maximum security" detention (R. 58, 60). After a few hours sleep he was interrogated from 9:00 a. m. until 4:00 p. m. by Immigration officers (R. 30). The F. B. I. agents who first entered Abel's hotel room the day before thereafter commenced their interrogation of the prisoner (R. 30, 60, 61).

On the third day of interrogation Abel stated that he was a Russian citizen illegally in the United States (R. 61). He then was permitted counsel, given a deportation hearing by Immigration and, at his own election, was ordered

deported to the U. S. S. R. on June 27, 1957 (G. Exhibit 86; R. 689-693).

For three weeks more the F. B. I. agents continued to question him and to seek his "cooperation" (31). According to Abel—and his statements in this respect were never contradicted in the trial court—the F. B. I. agents offered as inducements some comfortable quarters and even employment with another U. S. Government agency (31). He steadfastly refused to "cooperate."

5. Return to Brooklyn for Trial.

On August 7, 1957 Abel was indicted in Brooklyn for the capital crime of espionage. On that day, for the first time, a criminal warrant for Abel's arrest was issued and Abel for the first time was taken before a court, which ordered his return to Brooklyn for trial. No warrant to search his room at the Latham or to seize the articles found therein has ever been issued.

The foregoing is a summary of the factual background against which this Court is to determine whether the Fourth and Fifth Amendments have been violated in the case at bar.

POINT I(A).

The search in the case at bar lacked "good faith" as defined by this Court, because the true objective of the Department of Justice was to uncover evidence of Soviet espionage, rather than to determine Petitioner's status as a deportable alien.

"This challenge is now before us. All who believe in the virility of our birthright should stand united to see to it that we fight effectively and at the same

time preserve our freedom. To this end we must guard jealously the Bill of Rights and the civil liberties which are guaranteed by the Constitution and the traditions of this country . . . It will be a temptation in time of war to use the threat of our national existence to enforce points of view which are fundamentally hostile to the very freedoms we are fighting to defend."

James Bryant Conant,
 "Our Fighting Faith"
 (Cambridge, 1942), pp. 15-17.

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

It is only unreasonable searches that are prohibited by the Fourth Amendment. *United States v. Rabinowitz*, 339 U. S. 56 (1950); *Carroll v. United States*, 267 U. S. 132 (1925). Petitioner contends that the search of his room was unreasonable within the meaning of the Fourth Amendment in that, although it was made pursuant to a deportation warrant issued by the Immigration and Naturalization Service, its true objective actually was to uncover evidence relating to the crime of espionage, for use by U. S. counter-espionage forces if the accused would "coöperate" and, if that failed, for use in prosecuting him for that crime.

The law is well established that a search without a search warrant may be made when it is incidental to a lawful arrest for a crime. *Harris v. United States*, 331 U. S. 145 (1947); *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931). That such a search may extend beyond the person of the one arrested, to include the premises under his immediate control, is also clear. *United States v. Rabinowitz*, *supra*; *Agnello v. United States*, 269 U. S. 20 (1925).

However, searches made incidental to lawful arrests for crimes are not permitted without limitation. Thus, law-enforcement officers may not conduct an exploratory search for evidentiary materials tending to connect the accused with some crime, for reasons basic to personal freedom, *United States v. Lefkowitz*, 285 U. S. 452 (1932); *Go-Bart Importing Co. v. United States*, *supra*; Frankel, "Concerning Searches & Seizures", 34 Harv. L. Rev. 361 (1920). Further, the objects sought for must be either (1) the instrumentalities and means by which the crime charged in the warrant is committed, (2) the fruits of such crime, (3) weapons by which escape of the person arrested might be effected, or (4) property the possession of which is a crime. *Harris v. United States*, *supra*; *Agnello v. United States*, *supra*. The provisions of the Fourth Amendment against unreasonable searches also apply to hotel rooms. *United States v. Jeffers*, 342 U. S. 48 (1951).

(i) *The Harris Case.*

In the *Harris* case, *supra*, agents of the Federal Bureau of Investigation obtained two warrants to arrest the defendant, charging him with mail fraud and violation of the National Stolen Property Act, in connection with the forging of checks. The warrants were served upon defendant

in his apartment and the agents proceeded to search the premises, incidental to the arrest. In the course of the search they discovered and seized a quantity of altered Selective Service documents, unconnected with the crimes charged in the arrest warrants. The defendant subsequently was indicted and convicted for possession of the altered Selective Service documents.

This Court affirmed the conviction in a 5-4 decision. The majority and minority opinions of the Court comprise probably the most comprehensive study of the existing law, relating to permissible and prohibited searches and seizures incidental to arrest for a crime, that has been written.

In affirming the conviction, the majority reiterated the existing law that searches incidental to a lawful arrest cannot be of a general exploratory nature. The Court stressed the finding of the District Court that the search "was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two cancelled checks . . ." (p. 153) and that "the agents conducted their search in good faith for the purpose of discovering the objects specified . . . The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose" (p. 153). It was on this "good faith" basis alone that this Court upheld the validity of the search in that case.

In the instant case, petitioner was detained pursuant to an administrative Immigration warrant for deportation from the United States. It contains no provision for any search or seizure, was not based upon a finding of probable cause by an independent officer, and was unsupported by oath or affirmation. The warrant was issued at the request

of the F. B. I. (R. 75, 76, 163, 164); it was served at their direction (R. 138-140), and it had been previously agreed that it would be served only if petitioner refused to "cooperate" with the F. B. I. (R. 184, 185, 191). Agents of the Federal Bureau of Investigation were present when I. N. S. officers packed up all Abel's effects (over 200 items); they conducted their own search as soon as the Immigration officers left, although they had no operative jurisdiction over the offense charged in the warrant (R. 46, 693-695, 194). The Immigration officers stated that they were looking for weapons or "evidence of alienage" (R. 65, 68) but admitted that they found none (R. 37-46, 142, 150). F. B. I. agents participated in the complete search later conducted at I. N. S. headquarters (R. 48).

The evidence is overwhelming that the true objective of the search in the instant case was to uncover evidence of espionage, under the guise of a warrant to arrest pending deportation proceedings. The Government cannot possibly claim that F. B. I. agents were seeking evidence of petitioner's status as a deportable alien. Nor can the thin pretense that although they were present they did not participate in the search, justify the conduct of the Government in the instant case. *Cf. Byars v. United States*, 273 U. S. 28 (1927); see also uncontradicted public statement by the Commissioner of Immigration:

"We were well aware of what he was when we picked him up. Our idea at the time was to hold him as long as we could" (R. 76).

Because of this lack of "good faith", the search in this case falls squarely within the purview of the *Harris* decision and therefore is unreasonable under the Fourth Amendment. Nor can an illegal search be validated by

the discovery of evidence which may legitimately be subject to seizure. *Taylor v. United States*, 286 U. S. 1 (1932); *Byars v. United States*, 273 U. S. 28 (1927); *Amos v. United States*, 255 U. S. 313 (1921).

Since the search in the instant case was invalid, all property obtained as a result thereof should have been suppressed and its use as evidence in the espionage trial violated the Fifth Amendment. *Agnello v. United States*, 269 U. S. 20 (1925); *Weeks v. United States*, 232 U. S. 383 (1914); *Boyd v. United States*, 116 U. S. 616 (1886).

(ii) *Search and Seizure by Subterfuge.*

Under the *Harris* rule, searches and seizures violate the Constitutional ban if it is shown that "good faith" is lacking in police who possess a legally obtained warrant of arrest for any crime, based upon probable cause and returnable in open court. But in the instant case the Department of Justice deliberately employed for its own purposes an administrative warrant, issued by and returnable to themselves, in order to avoid public process. Such constitutes search and seizure by subterfuge, equivalent to the use of clandestine stealth.

In *Gouled v. United States*, 255 U. S. 298, (1921) a search and seizure of evidence by stealth, arranged by the Intelligence Department of the United States Army, was set aside by unanimous decision of this Court.* During World War I the defendant was suspected of fraud against the Government in connection with procurement contracts. A private in the Army, attached to the Intelligence Department and a business acquaintance of defendant, under

* White, Chief Justice; McKenna, Holmes, Day, Van Devanter, Pitney, McReynolds, Brandeis and Clarke, Associate Justices.

direction of his superior officers, pretended to make a friendly call upon the defendant, gained admission to his office and, in his absence, without warrant of any character, seized and carried away several documents later used as evidence to convict the defendant. This Court declared (255 U. S. at 305, 306):

“The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man’s house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.”

A review of subsequent decisions of this Court demonstrates that it has been the elements of deliberate duplicity and stealth in the procedures employed, which have been regarded as the primary bases of the *Gouled* decision. See *Olmstead v. United States*, 277 U. S. 438 at 463 (1928).

In principle, we submit, there is no difference between a search or seizure conducted with stealth and one arranged by subterfuge. See *United States v. Valente*, 155 F. Supp. 577 (Mass. 1957); cf. *United States v. Haupt*, 136 F. 2d 661 (7th Cir., 1943). Each is clearly repugnant to the letter and the spirit of the Fourth and Fifth Amendments,

designed in the Constitutional Convention to assure the end of such practices, which had been bitterly experienced by the American colonists and their ancestors in England. *Harris v. United States, supra.*

If the Constitutional prohibition applies to the clandestine theft of a document, surely it is applicable with greater force when, by deft application of an administrative process the Department of Justice can cause a man and all his effects to disappear from public knowledge for days, in the United States in 1957.

POINT I (B) .

The seizure in the case at bar was unreasonable, because the items did not relate to the Immigration warrant which was the basis of the search.

Assuming, arguendo, that the search in the instant case was valid, the seizure of all petitioner's belongings was unreasonable because only a few of the items seized could conceivably be related to the administrative warrant for his deportation. See 200 items in Record (R. 33, 37-45). His living quarters were literally stripped of all he possessed, which then was removed to I. N. S. headquarters for examination in his absence by the F. B. I. and I. N. S. See *Kremen v. United States*, 353 U. S. 346 (1957).

The Immigration warrant charged that petitioner was subject to deportation because he was an alien illegally in the United States. The search was incidental to this warrant, which does not charge the commission of a crime. *Harisiades v. Shaughnessey*, 342 U. S. 580 (1952). Yet even if the warrant did charge a crime, a review of the 200 items seized shows that few could even be argued to be (1) instrumentalities or means by which the crime had been committed; (2) the fruits of such crime; (3) weapons by which

escape of the person might be effected; or (4) property the possession of which is a crime. Virtually all items seized bore no logical relation to the "alienage" matters set forth in the Immigration warrant. Yet many were introduced as evidence in the espionage trial or were used to obtain exhibits introduced at the trial (see Appendix "C" hereto). The seizure accordingly was unreasonable and none of the items should have been used as evidence. *Gouled v. United States*, 255 U. S. 298 (1921); *Harris v. United States*, 331 U. S. 145 (1947); *Agnello v. United States*, 269 U. S. 20 (1925); *Boyd v. United States*, 116 U. S. 450 (1892).

POINT II.

Although a person is suspected of being an alien illegally in the United States, he cannot be subjected to a general search and seizure, and thereafter prosecuted for a crime on evidence so obtained, unless the search and seizure conform to the requirements of the Fourth Amendment.

*Give me your tired, your poor,
Your huddled masses, yearning to breathe free,
The wretched refuse of your teeming shore:
Send these, the homeless, tempest-tossed, to me:
I lift my lamp beside the golden door.*

Emma Lazarus, inscription
on the base of the
Statue of Liberty.*

Whether or not Abel is a Soviet spy, a precise legal issue is before this Court in the case at bar: whether, under our Constitution, a person whom the Department of Justice suspects to be an alien illegally in the United States, may be taken into custody, subjected to a general search and

* Quoted in Chafee, "Free Speech in the United States" (Harv. U. Press, 1946), p. 218.

seizure, and thereafter prosecuted for a crime on evidence so obtained, when the entire proceedings are based upon an administrative Immigration Service "warrant for deportation", issuable without a proper finding of probable cause, unsupported by oath or affirmation, and returnable within the Department of Justice.

The Fourth Amendment to the Constitution was intended to proscribe the issuance of general warrants and writs of assistance, which permitted exploratory searches by petty officers for evidence of any "crime". Since such writs were not returnable to an open court, the officers could enter any home at any time and make an indiscriminate search without public accountability. See the dissenting opinions in *Harris v. United States*, 331 U. S. 145 at 155 (1947), for a detailed history of the Fourth Amendment. As to the probable effects of permitting any relaxation of the stringent prohibitions of the Fourth Amendment, even in times of external danger, see *Colyer v. Sheffington*, 265 Fed. 17 (Mass., 1920), reversed on other grounds, 277 Fed. 129 (1st Cir., 1922); Chafee, *Free Speech in the United States* (1946); Frankel, "Concerning Searches & Seizures", 34 Harv. L. Rev. 361 (1920); Report Upon Illegal Activities of the U. S. Department of Justice, by 12 Lawyers (1920) cited by Charles Evans Hughes in Address at Harvard Law School, June 21, 1920; Hearings before Senate Judiciary Committee, 66th Cong., 3d Sess. (1921).

For these reasons, the Amendment specifies safeguards to protect against unreasonable searches and seizures, and Rule 41 of the Federal Rules of Criminal Procedure has further codified such safeguards. Accordingly, searches and seizures are normally permissible only after a warrant is issued by a judicial officer upon a finding of probable cause; it must be supported by oath or affirmation, must contain a detailed description of the place to be searched and the persons or things to be seized, and a return must

be promptly made before a judicial officer. *Jones v. United States*, 357 U. S. 493 (1958).

Exceptions to this fundamental rule exist. A person legally arrested for the commission of a crime may be searched. *Weeks v. United States*, 232 U. S. 383 (1914). The search may also extend to the premises under the immediate control of the person legally arrested, to discover and seize weapons, contraband, or the fruits or instruments of the crime for which he was arrested. *Harris v. United States*, 331 U. S. 145 (1947); *Agnello v. United States*, 269 U. S. 20 (1925). However, in all such cases there must be no question as to the validity of the suspect's arrest for the commission of a crime and specified procedures are required to effect a valid arrest. Rules 3, 4, 5, Fed. R. Crim. Proc.; *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931). Otherwise, any consequent search or seizure is deemed illegal. *Giordenello v. United States*, 357 U. S. 480 (1958).

*The Procedures In the Case at Bar Do Not Meet
the Requirements of the Fourth Amendment.*

In the case at bar, petitioner was not the subject of criminal arrest. The warrant directed the Immigration officers to take him into custody, pending proceedings to deport him from the United States (R. 33; 34-37). It was issued by and made returnable to a subordinate official within the Department of Justice, not a judicial officer. It contained no directive or authorization to search or seize. It was not based on a finding of probable cause and was unsupported by oath or affirmation. A deliberate decision had been made to institute such deportation proceedings and not to prosecute for the crime of illegal entry, at that time (R. 218-220).

It is established that the issuance of such a deportation warrant is not a criminal procedure. *Harisiades v. Shaughnessey*, 342 U. S. 580 (1952); cf. *Bilokumsky v. Tod*, 263 U. S. 149 (1923). The process does not need sworn statements as to probable cause; such a former requirement has been repealed. 8 U. S. C. 1252(a); cf. former Sec. 282, Title 8, U. S. C. For gradual weakening of procedural safeguards in these cases, compare Rule 22, Reg. of Sec. of Labor under Immigration Act of 1917 with Part 150, Reg. of Attorney Gen. of 1941, 6 F. R. 68 and Part 242, Reg. of Attorney Gen. of 1952, 8 C. F. R. 242.1 *et seq.* Furthermore, all Constitutional safeguards designed to protect the rights of persons charged with the commission of a crime, are not applicable to those taken into custody pursuant to an Immigration warrant. For instance, such persons do not have the right to bail, or a jury trial in the Immigration proceedings. *Marcello v. Bonds*, 349 U. S. 302 (1955); *Carlson v. Landon*, 342 U. S. 524 (1952). Nor does the Constitutional provision against *ex post facto* laws apply to such proceedings. *Harisiades v. Shaughnessey*, *supra*. Such persons furthermore do not appear before a judicial officer and are entitled to counsel only at the time of the formal Immigration hearing (35; cf. 30).

The present provisions of Rule 41 concerning the use of search warrants in criminal cases are derived, with one minor procedural change, from the Espionage Act of June 15, 1917, Tit. 11, 40 Stat. 217; *Revisor's Notes to Rule 41*. That Act prohibited the use of search warrants in connection with deportation proceedings. *Colyer v. Skeffington*, *supra*, at page 45.

From the foregoing, it is clear that an Immigration warrant, issued by agents of the Department of Justice, is not a warrant charging the alien with the commission of a

crime. It also is clear that it is an administrative procedure which does not conform to the requirements of the Fourth Amendment. Therefore it cannot be a lawful basis for a general search and seizure of an alien and his effects, which produces evidence later used to prosecute the alien for a crime. *Nathanson v. United States*, 290 U. S. 41 (1933); *United States v. Wong Quong Wong*, 94 Fed. 832 (D. Vt. 1899), cited with approval in *United States v. Shaughnessy*, 195 F. 2d 964 at 968 (2d Cir. 1952), reversed on other grounds, 345 U. S. 206; cf. *Giordenello v. United States*, 357 U. S. 480 (1958); *Robinson v. Richardson*, 13 Gray 454 (Mass. 1856), cited with approval by the Supreme Court of the United States in *Boyd v. United States*, 116 U. S. 616 at 629 (1886): See also the unqualified opinion of Chafee, *Free Speech in the United States* (1946) at pp. 204, 205.

Congress has recognized that even in time of war, if arrests on executive warrant should be required as emergency measures there should be safeguards "to insure the observance of procedural due process of law" in order to preserve any semblance of the Bill of Rights. See "Emergency Detention Act", Title II, Internal Security Act of 1950, 64 Stat 987; H. R. Rep. No. 2980, 81st Cong. 2d Sess. (1950) reported at 1950 Code Cong. Serv., pp. 3886-3922*.

An administrative procedure such as that employed by the Department of Justice in the case at bar, under which the Attorney General is accountable only to himself, without any of the safeguards discussed above, cannot and should not be the basis for a search and seizure of a man and his effects to procure evidence for use in the prosecution of a capital crime. Such administrative procedures

*The legislation was enacted by Congress over a veto by the President which was based primarily upon the refusal of Congress to provide for suspending habeas corpus. See Sutherland, "Freedom and Internal Security", 64 Harv. L. Rev. 383 at 395 (1950).

have characterized in our time the police states of Nazi Germany, Soviet Russia and their satellites, but are incompatible with the mores of a free society.

The rule of law established by this Court in the case at bar will be applicable in practice not to persons judicially determined to be aliens, but to all whom the Department of Justice may believe to be "alien" upon information satisfactory to itself. In a nation of immigrant stock, whether first or eighth generation, the Court may find no more enlightening guide to a sound decision than the letter and the spirit of the Fourth Amendment, written by men who had suffered for freedom and were dedicated to its future preservation:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Conclusion.

Rights granted to all by the Fourth and Fifth Amendments to the Constitution of the United States have been denied to the petitioner in the case at bar.

The judgment below must be reversed, and the case remanded for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

JAMES B. DONOVAN,
Attorney for Petitioner.

THOMAS M. DEBEVOISE, II, ,
Of Counsel.

APPENDIX A.

[Constitutional and Statutory Provisions]

1.

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3.

18 U. S. C. §794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party

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or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. As amended Sept. 3, 1954, c. 1261, Title II, §201, 68 Stat. 1219.

4.

18 U. S. C. §793. Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to

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believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal, station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photo-

Appendix A.

graphic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails

Appendix A.

to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer—

• Shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy. June 25, 1948, c. 645, §1, 62 Stat. 736, amended Sept. 23, 1950, c. 1024, §18, 64 Stat. ____.

5.

18 U. S. C. §951. Agents of foreign governments

Whoever, other than a diplomatic or consular officer or attache, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined not more than \$5,000 or imprisoned not more than ten years, or both. June 25, 1948, c. 645, 62 Stat. 743.

Appendix A.

6.

18 U. S. C. §371. Conspiracy to commit offense or to defraud
United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, ~~or any~~ agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

APPENDIX B.

**Evidence of Espionage Obtained by the Department of
Justice Prior to Abel's Detention for Deportation on
June 21, 1957.**

Date Obtained	Exhibit No. and Description	Record
May 15, 1957 (R. 583)	5—Photo of Prospect Park drop	R. 335, 337
May 12, 1957 (R. 507-528)	18—Quebec message	R. 401, 530
May 12, 1957 (R. 507-511-532)	19—"Ermas" birth certifi- cate	R. 427, 429
May 4, 1957 (R. 439-441)	23—Hollow Finnish coin.....	R. 441, 443
May 12, 1957 (R. 448, 507-514)	24—Radio Receiving Set.....	R. 446, 447
May 12, 1957 (R. 507-514)	25—Head phones	R. 447, 448
May 12, 1957 (R. 448, 514)	26—Copper plate and micro- scope lens	R. 448, 449
May 12, 1957 (R. 523)	27—Spectroscopic film.....	R. 451, 452
May 12, 1957 (R. 453-455, 507- 514)	28—Paper on color photogra- phy	R. 453, 455
May 12, 1957 (R. 453-455, 507- 514)	29—Paper on use of Vacuum Board	R. 453, 455
May 16, 1957 (R. 541)	31—Old screw	R. 460
May 12, 1957 (R. 462)	33—Camera	R. 462, 463
May 21, 1957 (R. 599-600)	34—Asko message	R. 463, 601

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Date Obtained	Exhibit No. and Description	Record
May 12, 1957 (R. 507-8)	39—Box of Espionage materials	R. 508
May 12, 1957 (R. 507-9)	40—Diagram	R. 509, 510
May 12, 1957 (R. 507-511)	41—Picture of Hole.....	R. 511, 513
May 12, 1957 (R. 507-511)	42—Wrapper	R. 511, 513
May 12, 1957 (R. 516)	43—9 foreign coins.....	R. 516
May 12, 1957 (R. 520)	44—Spectroscopic film	R. 520
May 12, 1957 (R. 507-524)	45—Hollow bolt	R. 524, 530
May 12, 1957 (R. 507-528)	46—Microfilm of Quebec mes- sage found	R. 528, 530
May 16, 1957 (R. 541)	48—Bolt	R. 541
June, 1953 (R. 575-576)	60—Photograph	R. 570, 581
June, 1953 (R. 574-575)	61—Hollow nickel	R. 575, 581
June, 1953 (R. 574-576)	62—Message in Hollow Nickel	R. 576, 581
May 15, 1957 (R. 583)	65—Hollow screw	R. 584, 588
May 15, 1957 (R. 583)	66—Photograph of drop area	R. 585, 586
May 15, 1957 (R. 587)	67—Message in hollow screw..	R. 587, 588
May, 1957 (R. 478)	Haybraun's Testimony	R. 286-500
May 12, 1957 (R. 507)	Gamber's Testimony	R. 507-515

Appendix B.

Date Obtained	Exhibit No. and Description	Record
May 12, 1957 (R. 477)	Mulhern's Testimony	R. 515-522
May, 1957 (R. 524, 525)	Webb's Testimony	R. 525-539
May 16, 1957 (R. 541)	Steel's Testimony	R. 541-542
June, 1953 (R. 569-574)	Bozart's Testimony	R. 569-571
June, 1953 (R. 572-573)	Milley's Testimony	R. 572-573
June, 1953 (R. 574)	O'Connor's Testimony	R. 574-577
May 15, 1957 (R. 582)	Millar's Testimony	R. 582-586
May, 1957 (R. 585)	Webb's Testimony	R. 587-588
May 23, 1957 (R. 644)	Heiner's Testimony	R. 644-649
May 24, 1957 (R. 650)	McDonald's Testimony	R. 649-653
June 13, 1957 (R. 654)	Carlson's Testimony	R. 654-655
June 13, 1957 (R. 656)	Sowick's Testimony	R. 655-657

[Additional evidence introduced at the trial undoubtedly was in the hands of the Department of Justice prior to June 21, 1957 but no date for its acquisition is fixed in the Record.]

APPENDIX "C"

List of Items Seized on the Deportation Warrant at the Hotel Latham on June 21, 1957 Which Were Used by the Department of Justice in the Espionage Case.

A. Items seized at the Latham which were introduced as exhibits at the espionage trial.

Exhibit No.	Description	Seized at Latham	Identified	Received
21	Queen Elizabeth message	R. 48-49(6)	R. 432	
77	Graph paper with numbers	R. 38(16)	R. 665	R. 666
78	Martin Collins birth certificate	R. 45(bot.)	R. 666	R. 667
79	Emil Goldfus birth certificate	R. 45(bot.)	R. 668	R. 669
80	International certificate of vaccination	R. 39(30)	R. 669	R. 671
81	East River Savings Bank book \$1,386.22	R. 45(1.8)	R. 669	R. 671
87	Hollow pencil	R. 46(1.23)	R. 694	R. 726
88	Hollow block of wood containing book with numbers	R. 46(1.21)	R. 694	R. 724
97	Microfilms, including	R. 727(1.21)	R. 727	R. 728
98	Radio Receiving Schedule	R. 727(1.35)	R. 727	R. 728
98A	Two letters	R. 728(1.1)	R. 727	R. 728
99	Microfilms	R. 728(1.6)	R. 728	

B. Items seized at the Latham, which were used to obtain exhibits introduced at the espionage trial:

Item Seized at Latham	No. and Description of Exhibit Obtained	Intra.	Received
3 bills from Broadway Central (R. 45, 1.9)	74. Registration card and bills from Broadway Central Hotel	R. 635	R. 635

Appendix C.

Item Seized at Latham	No. and Description of Exhibit Obtained	Identified	Received
3 bills from Daytona Plaza Hotel (R. 45, l. 10)	75 Registration Card and bills from Daytona Plaza Hotel.	R. 636	R. 636
7 bills from Hotel Latham (R. 45, l. 11)	76 Records of Hotel Latham	R. 658	R. 658
Martin Collins birth certificate (R. 45, bot.)	78A Enlargement of the Martin Collins birth certificate	R. 717	R. 717
	78B, C, D, E, F "	R. 717	R. 717
Birth Certificate of Emil Goldfus (R. 45, bot.)	82 Birth certificate of Emil Robert Goldfus	R. 677	R. 677
"	83 Death Certifi- cate of Emil Robert Goldfus	R. 678	R. 681
Birth Certificate of Martin Collins No. 32024 (R. 45 (bot.), 682)	84 Birth certificate of Esther Wohman No. 32024	R. 681	R. 682
" which (bears signature of Dorothy Adams (R. 667)	85 Handwriting samples of Dorothy Adams in charge of writing hand- written certificates for Dept. of Health.	R. 683	R. 684
	85A, B Enlargements of 85	R. 716	R. 716
Exhibit 98—radio receiving schedule (R. 727, l. 35)	100 Record of Monitor- ing radio frequencies at times mentioned in Exhibit 98	R. 746	R. 753

Appendix C.

C. Additional items seized at the Latham, concerning which testimony was offered at the espionage trial:

Hallierafter short-wave radio
aerial of green covered copper
wire

Kleenex

Painter's supplies

Lead pencils

2 pieces of paper

Magazines

Sundry articles

Testimony of I.N.S.
agent Schoenenberger
(R. 663-665)

Testimony of F.B.I.
agent Kehoe (R. 694)

D. Items seized at the Latham which were used by the Department of Justice to procure a search warrant for espionage materials on June 28, 1957 (R. 48-54, 247-261):

A Hallierafter short-wave radio.

Emil Goldfus birth certificate.

Martin Collins birth certificate.

International Certificate of Vaccination.

A piece of graph paper containing eight rows of numbers, in groups of five digits.

A scrap of paper containing the following printed message: "I bought a ticket next ship—Queen Elizabeth for next Thursday—1.31. Today I could not come because 3 men are tailing me."

A scrap of paper containing the following hand written note: "In Mex.: Signal 'T' on pole opposite #191 Chihnahva (Chihvahaa St) (Fonolia Roma), using side of pole towards roadway. Sat or Sun, Tues, Thur. Met on Mon, Wed, Fri at 3pm movie 'Balmora'."

A slip of paper containing the following typewritten message: "'Balmora', Avenida Oberon, 3 p.m. Display left of entrance. I. 'Is this an interesting picture?'. L. 'Yes. Do you wish to see it, Mr. Brandt?' L. smokes pipe and has red book in left hand."

A slip of paper containing the following typewritten message: Mr. Vladinec, P.O. Box 348. M-w, K-9.

Appendix C.

USSR. Sign 'Arthur'. W. Merkulow, Poste Restante, M-a, USSR (Russia). Sign 'Jack.'

A torn slip of paper containing the following message:
 "... Will w... in London 2-3 day while your message arrives. P."

Two wooden pencils.

One mechanical pencil.

A small wooden pencil.

Photographic Frames of microfilm with writing thereon.

Clothing store bill in name of Goldfus.

Camera bag.

Camera.

Numerous lenses and other photographic equipment.

Film.

Aerial.

E. Trial exhibits obtained from items seized on June 28, 1958. (See D, above)

Item Seized	No. and Description of Exhibit at trial	Identified	Received
Rent receipts to 23 Riverside Dr. (R. 259, No. 173)	50 Lease & application for lease at 23 Riverside Dr.	R. 545	R. 546
"	51 Letter terminating lease at 23 Riverside Dr.	R. 545	R. 546
Sales receipt of Eastman Kodak (R. 259, No. 173)	53 Purchase order of Eastman Kodak	R. 555	R. 556
"	54 Sales slip of Eastman Kodak	R. 555	R. 556
"	55 Ledger of Eastman Kodak	R. 555	R. 556
"	56 Accounts receivable page of Eastman Kodak	R. 555	R. 556
Pass book, N.C.B. of N. Y., 96th St. (R. 256, No. 113)	71 Signature card N.C.B. of N. Y., 96th Street	R. 630	R. 631

Appendix C.

Item Seized	No. and Description of Exhibit at trial	Identified	Received
Pass book, N.C.B. of N. Y., Montague St. (R. 260, No. 195)	72 Signature card and records of N.B.C. of N.Y., Montague St.	R. 631	R. 633
Rent receipts of Benjamin Franklin Hotel (R. 253, No. 54)	73 Signature card of Benjamin Franklin Hotel,	R. 634	R. 634

F. Items seized at the Latham used to procure a search warrant on August 16, 1957. (R. 265)

Small wooden pencil

Number of photographic frames of
microfilm

G. Trial Exhibits which were seized on the August 16, 1957
search warrant (see F., above):

No. and description	Identified	Received
32—Electric converter—from 6 volts to 110 volts	R. 461	R. 699
82—Roll of Spectroscopic Film	R. 696	R. 699
90—2 sheets of paper with numbers.....	R. 696	R. 699
91—A screw.....	R. 696	R. 701
91A—A screw.....	R. 696	R. 701
92—Flashlight battery.....	R. 699	R. 700
93—Brass container.....	R. 699	R. 700
93A—Brass container.....	R. 699	R. 700
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96—Cuff links.....	R. 700	R. 700

In the Supreme Court of the United States

OCTOBER TERM, 1958

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK"
AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R.
GOLDFUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,

Solicitor General,

J. WALTER YEAGLEY,

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B. The petitioner, having failed to object that the seizure was unreasonable because of the quantity of items taken from his hotel room following his arrest, prior to or at the trial below, may not raise that issue initially before this Court. In any event, the record establishes that only a limited number of items were actually "seized" by the I. N. S. officers-----

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C. Each of the items introduced in evidence was subject to seizure during a proper search-----

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1. The items seized by the I. N. S. officers during the search incident to the petitioner's arrest-----

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 263

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK"
AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R.
GOLDFUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 837-865) is reported at 258 F. 2d 485. The opinion of the District Court denying petitioner's pre-trial motion to suppress evidence (R. 239-246) is reported at 155 F. Supp. 8.

JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 1958 (R. 865). The petition for a writ of certiorari was filed on August 8, 1958, and was granted on October 13, 1958, limited to the first two questions presented by the petition for the writ (R.

866). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

This Court's order granting the writ of certiorari (R. 866) limited the questions to be considered to the first and second questions as presented by the petition, namely:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Fourth and Fifth Amendments to the Constitution of the United States and the text of 18 U. S. C. 793, 794, 951 and 371 are set forth in Appendix A to petitioner's brief (Br. 32-37). The pertinent provisions of 8 U. S. C. 1103 (a), 8 U. S. C. 1251 (a) (5), 8 U. S. C. 1252 (a), 8 U. S. C. 1305, 8 U. S. C. 1306, and 8 C. F. R. 242.2 (a), are set forth in the Appendix, *infra*, pp. 62-64.

STATEMENT

On August 7, 1957, the petitioner was indicted on three counts charging him with having conspired, from about 1948 to the date of the indictment, (1) to communicate and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States (conspiracy to violate 18 U. S. C. 794 (a)), (2) to obtain documents and other materials connected with the national defense of the United States for the purpose of transmitting such documents to the U. S. S. R. (conspiracy to violate 18 U. S. C. 793), and (3) to act in the United States as an agent of the U. S. S. R. without prior notification to the Secretary of State (conspiracy to violate 18 U. S. C. 951) (R. 7-19).¹

Prior to trial on the indictment, which was returned in the Eastern District of New York, the petitioner moved in the Southern District of New York to suppress evidence seized from his hotel room on the date of his arrest (R. 20-55). On motion of the government, the petitioner's motion to suppress evidence was dismissed by the District Court for the Southern District of New York, with leave to petitioner to file the motion in the Eastern District, the District of trial (R. 239). Copies of all pleadings and affidavits which had been filed in the Southern district of trial (R. 239). Copies of all pleadings deemed to have been filed in that court. Additional affidavits were submitted and a hearing on the motion

¹ 18 U. S. C. 794 and 793 each has its own conspiracy provision. Conspiracy to violate 18 U. S. C. 951 is punishable under the general conspiracy statute, 18 U. S. C. 371.

to suppress was held (R. 79-238). The motion was denied (R. 239-246).

The petitioner was then tried before a jury, convicted on all three counts, and on November 15, 1957, sentenced to a total of thirty years imprisonment and to pay a fine of \$3,000 (R. 5-6). The conviction was affirmed by the Court of Appeals (R. 865).

BACKGROUND OF ARREST AND SEARCH

In May, 1957, Reino Hayhanen, who since 1954 had been petitioner's assistant in Soviet espionage work in the United States (R. 290, 377-380) and who was at that time a Lieutenant Colonel in the Soviet State Security Service (NKVD) (R. 457-458) defected from the Soviet espionage apparatus by going into the American Embassy in Paris, France, and offering to furnish information, which he then did (R. 439-444). Within a few days, Hayhanen returned to the United States (R. 444) and the FBI immediately conducted an intensive investigation of the espionage activities of the petitioner (who was known then only by the cryptonym "Mark") (R. 56-57). FBI agents searched, with his consent, Hayhanen's home in Peekskill, New York, uncovering considerable corroborative evidence of espionage on the part of Hayhanen and the petitioner, including a microfilmed message received by the petitioner from his Soviet superiors in connection with his instructions to locate an American Army Sergeant who had been compromised while in Moscow and had furnished information to the Soviets (Exs. 18, 45, 46; R. 508, 515-516, 394-395, 528-530, 536-537); the agents also un-

covered from what Hayhanen had described as a secret "drop" in Prospect Park, in Brooklyn, a typewritten message concealed in a hollowed-out screw container (Exs. 5, 65, 66; R. 582-588).²

FBI agents also undertook a surveillance of the petitioner's studio in Room 505 of 252 Fulton Street, Brooklyn, New York, observing him enter and leave the room during hours close to midnight on May 23 and June 13, 1957 (R. 644-647). Many other details of the investigation conducted prior to the petitioner's arrest by I. N. S. officers on June 21 are disclosed by the record in this case.

The evidence developed during the course of this investigation was submitted to and reviewed by attorneys of the Internal Security Division of the Department of Justice and the conclusion was reached that the petitioner had conspired to violate the espionage statutes. Following this determination, two Justice Department attorneys interviewed the principal witness in the case on June 18 and 19, 1957. Although this witness (Hayhanen) had already furnished and was willing to continue to furnish, on a confidential basis, information to be used by the United States Government for intelligence purposes, he absolutely refused to agree to testify in any public proceeding for fear of reprisals that he claimed would be taken by the U. S. S. R. against his mother, brothers and sister, who at that time were, and presumably still are,

² This message read: "Nobody came to meeting either 8th or 9th at 203 2030 as I was advised he should. Why? Should he be inside or outside? Is time wrong? Place seems right. Please check."

in the Soviet Union (R. 57). Hayhanen was a co-conspirator of the petitioner, and was so named in the indictment (R. 7-19). Because of Hayhanen's absolute refusal to testify as to his espionage activities in a public proceeding, which because he was a co-conspirator would be upheld under the Fifth Amendment, the Internal Security Division concluded on June 19, 1957, that the evidence then available was insufficient to secure a warrant on complaint or to secure an indictment on charges of conspiracy to violate the espionage statutes (R. 57).

If Hayhanen had not been adamant in his refusal to testify publicly as of that time, the Internal Security Division and the Federal Bureau of Investigation were prepared, and fully intended, on June 19, 1957, to initiate the necessary legal steps to secure a warrant and effect the arrest of the petitioner on espionage charges (R. 57). However, on that date, the Department of Justice, with information that a Soviet national was in the United States illegally and was heading up a Soviet espionage apparatus, was unable to proceed under the espionage statutes for the reason given. The Department could proceed under the immigration laws (*ibid*). An administrative warrant for the arrest of an alien under 8 U. S. C. 1252 and an order to show cause why he should not be deported (R. 33, 34-36) were duly issued by the Acting District Director of the Immigration and Naturalization Service, New York City, on June 20, 1957, and the petitioner was arrested the next day.

Following the petitioner's indictment on espionage charges in August, 1957, and the subsequent filing by

him of the motion to suppress, both parties submitted affidavits concerning certain factual issues raised by the motion and a hearing was thereafter held thereon before District Judge Byers of the District Court for the Eastern District of New York on October 8 and 9, 1957 (R. 4, 79-238). The petitioner's argument that his motion should be granted was based on two grounds, which were stated by Judge Byers in his opinion denying the motion, as follows (R. 242-243; 155 F. Supp. 8, 10):

(1) The search incidental to his arrest was illegal since a deportation proceeding is not criminal in nature.

(2) If the foregoing is decided against him, that the search should be deemed to be illegal and not made in good faith, for the reason that the Department of Justice used the deportation procedure and the incidental arrest in bad faith; that the ultimate purpose was to secure evidence as the result of a search which could be used in a prosecution for the alleged violation of our espionage laws, although at the time that the arrest and search took place, the Department was not in a legal position to institute a criminal prosecution based upon the alleged violation of the espionage statutes.

The taking of testimony on the motion commenced on October 8, 1957, and consumed the better part of two days. The petitioner called as witnesses three of the four arresting officers, one FBI agent, and an immigration official who had authorized proceeding pursuant to 8 U. S. C. 1252 (a).

EVIDENCE ON THE MOTION TO SUPPRESS

The evidence presented at the hearing as supplemented by testimony given at the trial established the following:

On or about June 13, 1957, Sam Papich, the FBI liaison officer with the Immigration and Naturalization Service (R. 159, 198-199), informed Mario T. Noto, the Deputy Assistant Commissioner for Special Investigations of the I. N. S. (R. 91, 198), in the latter's offices, that the FBI had information concerning an alien then in the United States who had illegally entered this country from Canada and who was in possession of fraudulent documents purporting to evidence American citizenship (R. 199). Papich further told Noto that the FBI had considerable information that the suspect was engaged in espionage (R. 199-200). Noto asked Papich for additional details concerning the suspect's illegal entry and status in the United States, and Papich told Noto that he would attempt to get the information (R. 200). Papich gave Noto no further information concerning the suspect's espionage activities and Noto "didn't ask him any questions with respect to that, because my interest from a jurisdictional viewpoint is confined to the illegal status which he had in the United States" (R. 200; see also R. 202). Papich did not indicate to Noto what action he desired the latter to take concerning the information (R. 200); and Noto did not indicate to Papich that he would take no action until hearing further from Papich (R. 202). No arrangements were made for Noto to confer further with the FBI (R. 202).

Following his conversation with Papich, Noto had a search of I. N. S. records made for any available information pertaining to an individual known by any of the names by which Papich had referred to the suspect (R. 201-202, 214). On June 18, 19, or 20, 1957, Papich gave Noto additional information concerning the case, including all the names and aliases used by the suspect; he told him that the suspect had used a birth certificate under an assumed name, that he had entered the United States from Canada, that he had admitted to various persons that he was in the United States illegally, that he held some kind of rank in the Soviet espionage apparatus, and that he had engaged in espionage (R. 203-204).

After Noto received this additional information, he had a brief conversation with General Swing, the Commissioner of the I. N. S., during which Noto told General Swing that in his opinion the I. N. S. "had a case—an immigration case—on Mr. Abel for illegal entry" (R. 203). Noto further told General Swing, who had not previously known of the case, that he "proposed to place Mr. Abel under deportation proceedings, and I also acquainted him with the—slightly—with the background—that is, the matters relating to espionage activities" (R. 203).

On June 19th or 20th, after receiving the information from Papich and discussing the matter with General Swing, Noto had a conversation at the FBI offices with two officers of the FBI named Moore and Latranto (R. 203-205). This conversation further confirmed what had been told Noto by Papich (R.

205-206). The FBI did not tell Noto when to arrest petitioner (R. 207). Noto told Moore and LaTranto that he "would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes" (R. 207). As he left, or shortly after the meeting, Noto told Moore and LaTranto that he had determined that he had enough evidence on which to order Abel's arrest on charges of "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act which makes it a deportable offense" (R. 207; see also R. 210). Noto also said that he "was going to act on it quickly" (R. 208).

On June 20, 1957, at approximately 3 p. m., Noto informed Robert Schoenenberger, a supervisory investigator in the Washington office of the I. N. S., who was directly under Noto (R. 91-92), and Lennox Kanzler, a divisional investigator in the I. N. S. Washington office who was directly under Schoenenberger (R. 157-158), that the FBI had information that a colonel in the Russian Secret Service was illegally in the United States and was also suspected of espionage (R. 92, 158). Neither Schoenenberger nor Kanzler had ever heard of the case before that day (R. 117, 158). Noto instructed Schoenenberger and Kanzler to accompany him to the offices of the FBI (R. 158). There, in the late afternoon, they met with several members of the FBI, including Papich (R. 158-160). The FBI personnel told the three I. N. S. investigators that the FBI had information which might be of interest to the I. N. S., and which the I. N. S. was free to use, concerning "an alien who

had illegally entered the United States" and who was living in New York City under the name of Martin Collins or Emil Goldfus (R. 160-161). They further said that the suspect was believed to be a Russian colonel engaged in espionage (R. 161), and they gave the I. N. S. personnel a report describing this "person who had entered the United States illegally in 1949 from Canada at an unknown port" (R. 125, 131-132, 161, 213).

After reviewing the information which they received from the FBI, Noto, Schoenenberger, and Kanzler concluded that they had sufficient information to draw up, in the name of "Martin Collins," an order to show cause why the recipient should not be deported and an I. N. S. administrative arrest warrant (R. 33-37, 106-108, 115). Noto instructed Kanzler to draw up these documents (R. 163-164, 216). The preparation of these instructions was carried out entirely on the initiative of the three I. N. S. personnel (R. 96, 163), since, as Schoenenberger testified, no instructions were necessary once they had received information sufficient to satisfy them that a person was illegally in the country (R. 96). The decision to institute deportation proceedings rather than charge petitioner with a crime³ was made by Noto alone after discussion of the matter within the I. N. S. (R. 217-218, 220, 223-224).

³ It appeared that petitioner had failed to notify the Attorney General of his address as required by law (8 U. S. C. 1305). Failure to do so is a criminal offense (8 U. S. C. 1306) in addition to rendering the alien deportable on that ground alone (8 U. S. C. 1254 (a) (5)). See R. 35.

Noto told Schoenenberger and Kanzler to go to New York to supervise the apprehension of the person alleged to be illegally in the country (R. 91-92, 165, 211). Noto instructed Schoenenberger to convey the information which they had concerning the petitioner to John Murff, the New York Acting District Director of the I. N. S., to have Murff sign the arrest warrant and order to show cause, and to arrest the petitioner as early as possible the next morning (R. 211, 213). Noto "told him that in the interest of coordination, in view of Mr. Abel's background, that when he arrived in New York after his conversations with the District Director, that I would appreciate it if he would get in touch with the New York office of the F. B. I." (R. 211; see also R. 164-165, 212). The F. B. I. did not request this procedure (R. 212). Noto called the New York office of the I. N. S. to tell them Schoenenberger was coming, so that Murff would be available to confer with Schoenenberger (R. 215). Noto did not talk with the New York office of the FBI (R. 215).

Schoenenberger and Kanzler arrived at the Newark airport at 10:30 p. m., on June 20th. There they were met by I. N. S. Investigators Edward J. Farley and Edward Boyle of the New York office of the I. N. S. (R. 93-94, 123-124). Schoenenberger instructed Farley to drive them to the New York office of the I. N. S. (R. 95, 124). On the ride from the airport, Schoenenberger and Kanzler told Farley and Boyle "that there was an alien illegally in the United States, whom the FBI had been investigating and that we were to make an arrest of this particular person" (R.

124-125). After arriving at the New York office Schoenenberger discussed the case with Acting District Director Murff (R. 95). After Murff reviewed the information and agreed that there was a sufficient basis to issue a show cause order and warrant of arrest, he and Schoenenberger concluded that the documents should be immediately issued and served on the petitioner (R. 95, 108). At approximately midnight, accordingly, Murff signed the order to show cause and the arrest warrant which Schoenenberger had brought from Washington (R. 96, 108). After the documents were thus completed, Schoenenberger discussed with Murff, Farley, Kanzler, and Boyle the question of when the documents would be served on the petitioner (R. 96).

In the early morning of June 21, 1957, *i. e.*, just after midnight, Schoenenberger, Kanzler, Farley, and Boyle left the New York offices of the I. N. S. to go to the New York offices of the FBI, where Schoenenberger talked to six or eight FBI agents concerning how the I. N. S. could locate and identify the suspect (R. 97-100, 134-135, 137). One of the FBI agents asked Schoenenberger to give the FBI the opportunity to interview the suspect before the arrest in order to ascertain whether he would "cooperate" (R. 97, 98-99, 140). Schoenenberger agreed (R. 98-99), and they made arrangements for the arrest (R. 100, 136, 140, 148). Schoenenberger designated Investigators Farley and Boyle to stand by during the FBI's interview of the suspect (R. 102). Farley and Boyle were never instructed what they should do if the

suspect "cooperated," nor were they given any indication that their instructions to make the arrest were on a contingent basis (R. 140, 148).

The four I. N. S. officials spent the remaining few hours of the night at the FBI headquarters, where sleeping facilities were provided (R. 100, 137). At approximately 6:30 a. m., Schoenenberger, accompanied by two FBI agents, left for the Hotel Latham, where the arrest was to be made (R. 100). They arrived at the hotel at approximately 7 a. m. (R. 101). For the next half hour, by prearrangement, they cruised about the area, and at 7:30 a. m. they entered the hotel (R. 101).

Shortly before 7 a. m., investigators Farley and Boyle likewise left the FBI headquarters and proceeded to the Hotel Latham, where they had been instructed to meet certain agents of the FBI (R. 137). At the hotel, shortly after 7 a. m., they met FBI agents Gamber, Blasco, Phelan, Green, and one or two others (R. 101, 137-138). Green and another FBI agent, accompanied by Farley and Boyle, went to Room 841 of the hotel, which was a short distance down the corridor from Room 839, the room occupied by the petitioner (R. 137-138). Farley and Boyle, who had the show cause order and the warrant of arrest, waited in Room 841 for the FBI's interview with the petitioner to be concluded (R. 138).

Agents Gamber and Blasco had been instructed by their superior in the FBI to knock on the door of Room 839 as near to 7 a. m. as possible and to attempt to interview the occupant with a view to "solicit[ing] his cooperation regarding his background

and also about activities of his in the United States" (R. 175; see also R. 241). At 7:02 a. m., Gamber knocked on the door (R. 175, 241). When the petitioner opened the door a little, Gamber, followed by Blasco, pushed it open wider and walked into the room (R. 175). The room was a small single hotel room, approximately twelve feet by eight feet in size, with an adjoining bathroom (R. 140). Gamber and Blasco showed the petitioner their credentials and told him orally that they were agents of the FBI (R. 177). He was at that time naked, but he partially dressed within a few minutes (R. 176-177). Several minutes later, FBI agent Phelan entered the room and showed the petitioner his credentials (R. 177, 241).

Gamber told petitioner that the FBI was charged with the responsibility of investigating matters pertaining to the internal security of the United States, and that the agents wished to talk to him concerning such a matter (R. 179-180, 241). The petitioner made no reply (R. 180). Gamber asked the petitioner his name, and he replied "Martin Collins" (R. 180, 241). Gamber then asked his birthdate and the petitioner "muttered June 15, July 15, and did not indicate the year of his birth" (R. 180, 241). After being given his false teeth he replied "July 15, 1897" (R. 180, 241). When he was asked why he said both "June 15" and "July 15", he said nothing (R. 180, 241). In response to other questions, the petitioner said that he was born in New York City and lived in room 839 (R. 180, 241). He did not answer questions about how long he had lived at the Hotel Latham and where he had lived previously (R. 180-181, 241).

He was then asked the name of his mother, her maiden name, whether he was employed, when he was last employed, the name of his father, whether he had any brothers or sisters, whether he had any relatives in the United States, and where he had resided most of his life (R. 180, 241-242). He gave answers to some of the questions, and remained silent as to others (R. 180-181, 241-242). No other questions were asked (R. 182). The agents told the petitioner that the FBI had information that he had been involved in espionage (R. 183-184). The petitioner was told, on three or four occasions, that the agents desired that he "cooperate" by answering the questions which he had declined to answer, and he was told that, if he did not do so, he would be arrested before he left the room (R. 181-183, 184, 242). The agents did not indicate to him what would happen if he "cooperated" (R. 184). Blasco had been instructed that, in the event that the petitioner "cooperated", he or Gamber was to call his immediate superior at the New York office of the FBI and relate the "degree of cooperation" which the petitioner exhibited (R. 184-185). Gamber and Blasco had been instructed that, if the petitioner did not cooperate, they were to have agent Phelan, who had been in the room during most of the interview, summon "the I. N. S. investigators who were present in the hotel to Room 839 to effect the arrest warrant of Collins" (R. 185, 191). The I. N. S. investigators' instructions to arrest the petitioner were not, as previously noted, on a contingent basis (R. 140, 148).

At approximately 7:25 a. m., after talking to the petitioner for a little less than half an hour, Gamber

and Blasco decided to have Phelan call the I. N. S. investigators to effect the petitioner's arrest (R. 189-190). Phelan went to the door of Room 841 and motioned to Farley and Boyle that the interview had been completed and that they could make the arrest (R. 138, 139-140, 242). After entering the petitioner's room with Farley, Boyle, after identifying the person in the room as "Martin Collins", served him with the arrest warrant (R. 33, 54 67, 189). Boyle then read to the petitioner a portion of the Order to Show Cause and asked him to sign it—which the petitioner did (R. 34-37, 53-54, 67-68, 140-141, 189-190). Boyle then advised the petitioner that he had a right to counsel (R. 189).

At approximately 7:30 a. m., Schoenenberger and Kanzler entered the hotel and went directly to the petitioner's room (R. 65, 68, 101, 142, 165, 662). Farley, Boyle and the petitioner were in the room, Gamber was leaving the room (R. 102, 151, 702), and Blasco had moved to the rear of the room, where he remained for twelve to fifteen minutes. (R. 190-191.) Schoenenberger, accompanied by Kanzler, entered the room in order to supervise the taking of the petitioner into custody and the examination of "his personal effects in an effort to locate documentary evidence of alienage" (R. 65, 102).

After ascertaining that the petitioner had no weapon on his person with which to harm either himself or the arresting officers, Farley asked the petitioner, who was in his undershorts, to get dressed, and inquired whether he wanted to wear any particular suit (R. 68, 141, 242). The petitioner pointed

to a particular suit hanging in the closet; after searching the suit for weapons and documents relating to alienage, Farley handed it to him (R. 68, 141). The undershirt he selected was similarly searched and handed to him (R. 68, 141).

Schoenenberger, Kanzler, Farley, and Boyle then made a search of the room and its contents in an effort, according to Farley, to find "nationality documents" or "weapons" (R. 141; see also R. 68, 150). According to Kanzler, the officers were looking for "evidence of identity, alienage and nationality" (R. 166): This search took fifteen or twenty minutes (R. 142, 147). Schoenenberger then asked the petitioner whether he wanted to take his personal effects with him (R. 109). The petitioner replied that he did "with some reservations" (R. 109). Schoenenberger, Farley, Boyle, and Kanzler then assisted the petitioner in the packing of his belongings; in doing so, they searched his baggage for "any dangerous weapons" and, in addition, according to Schoenenberger, they "made a superficial search for evidence of alienage" (R. 65, 109). Farley testified that he was "definitely not" instructed to search for evidence of espionage (R. 151). No FBI agent participated in the search, nor was any agent consulted during the search (R. 113, 143-144, 151, 192-193). Nor, with the exception of Blasco, who remained in the room during part of the search, was any FBI agent even present in the room during the search (R. 113, 143, 151, 169, 190-191). Agent Gamber, however, remained in the corridor during the search, near the doorway to the

room, where he was later joined by Biasco when the latter left the room (R. 142-143, 169, 190).

After the petitioner's baggage had all been packed, he asked to repack one of the larger bags (R. 65, 68-69, 109, 112). While the petitioner was repacking the bag, Schoenenberger noticed that he was attempting to slip some papers into his right sleeve (R. 65, 109, 665). Schoenenberger took the petitioner's hand and removed three pieces of paper (R. 65, 110, 665).⁴

During the packing, the petitioner was allowed to choose—and did choose—what he wanted to take with him and what he wanted to leave behind (R. 109, 112). He discarded certain items, including some jars of painter's supplies which were on the window sill and which he stated he would leave since he did not want them (R. 69, 109, 663). He also discarded into the wastebasket a handful of pencils, a couple of packages of Kleenex, and several other articles (R. 109, 114, 663).

During the packing, Kanzler questioned the petitioner about "what he wanted done about his hotel room" (R. 167). The petitioner asked where he was to be taken and he was told that he was to be taken to the New York offices of the I. N. S. (R. 167). According to Kanzler, "after he [petitioner] learned that, he said, 'Well, I guess I might as well check out of the hotel.'" (R. 167).

Farley asked the petitioner how much he owed the hotel, and the petitioner answered "\$21" (R. 69, 144, 191-192). Farley called the desk clerk on the room.

⁴ One of these, a numerical code message, was received in evidence at the trial (Ex. 77, R. 665-666).

telephone extension and asked him to prepare the petitioner's bill (R. 146). The bill was brought up to the room by one of the FBI agents who were waiting nearby and handed to the petitioner; the petitioner gave the necessary money to Farley, who in turn gave it to the agent; the agent then took the money to the desk, where the bill was paid and receipted (R. 69, 70, 144-146).⁵ The amount of the bill was \$25.20, which paid for the room through the previous night of June 20th⁶ (R. 236, 660). According to the manager of the hotel, the petitioner would have been entitled, without further payment, to keep the room until check-out time on June 21st, which was 3 p. m. (R. 659-660). However, as the manager further testified, "if the key is turned in and the baggage is taken out [before check-out time], the room is given up" (R. 660) and the guest is no longer entitled to the use of or access to the room (R. 659-660), which is then available to be rented to someone else (R. 661).

At approximately 8:30 a. m., Schoenenberger, Kanzler, Farley, and Boyle left the hotel with the petitioner and his personal effects, entered an I. N. S. automobile, and drove to the New York offices of the I. N. S. (R. 59-60, 69-70, 108-109, 113, 147, 242, 663, 705). There the I. N. S. arresting officers conducted a more thorough search of the petitioner's effects (R.

⁵ The petitioner had been allowed to keep all the money that was in the room at the time of the search (R. 145).

⁶ The room rental was \$4 per day (plus tax), which the petitioner paid, in arrears, on a weekly basis (R. 659). On the preceding Saturday, June 15th, the petitioner had paid \$29.40 for the previous week (R. 659). Thus, on Friday, June 21st, the petitioner owed six days' rent (R. 659).

59-60). All but about sixteen items were tendered back to the petitioner prior to the hearing, but were refused because of the "storage problem." (R. 79.)

Immediately after the petitioner and the I. N. S. officials left the hotel, FBI agent Kehoe communicated with the hotel manager, Nat Wilson (R. 70, 694). Wilson told Kehoe that the petitioner "had checked out of the hotel and had paid his bill in full" (R. 70, 658). At the request of Kehoe, Wilson executed a written "Consent to Search" Room 839 (R. 70, 658). At about 9:15 a. m., after Wilson personally inspected Room 839 from the doorway to make certain that the petitioner had vacated it (R. 70-71), Kehoe and several other FBI agents began to search the room, which no one had entered after the petitioner's departure (R. 706), and they completed the search at approximately 12:15 p. m. (R. 51, 71, 703-704, 706). The agents seized all articles found in the wastebasket which was full (R. 694).

At 4:15 p. m. the same day, June 21, 1957, the petitioner was taken by plane to the Alien Detention Facility at McAllen, Texas (R. 58, 60). On June 23rd and 24th, he was questioned at McAllen by FBI agents (R. 60-61). On June 24th, and again on June 27th, during the hearing on the deportation charge, the petitioner admitted that his true name was Rudolph Ivanovich Abel, that he was a citizen of Russia, and that he had entered the United States illegally (R. 49, 61-62, 690-693).

SEIZED ITEMS INTRODUCED IN EVIDENCE

The Government offered in evidence at the trial only seven of the items which were found in Room 839 of the Hotel Latham (R. 661-671, 693-695, 724, 726). These consisted of: (1) a fictitious birth certificate in the name of "Martin Collins" (Ex. 78); (2) a spurious birth certificate in the name of "Emil Goldfus" (Ex. 79); (3) an International Certificate of Vaccination dated May 23, 1957, in the name of Martin Collins, evidencing that "Collins" was vaccinated by Dr. Samuel Groopman on May 21, 1957 (Ex. 80; R. 39, 49, 599, 669-671); (4) a bank book issued by the East River Savings Bank, New York City, in the name of E. R. Goldfus (Ex. 81; R. 45, 84, 671-672); (5) a strip of graph paper containing a coded message in 78 groups of digits, with five digits to the group (Ex. 77; R.

The "Collins" certificate bore the number 32024, and purported to have been issued by New York County. It stated that "Collins" was born on July 2, 1897 (R. 45, 667). The records of the New York County Health Department show that birth certificate No. 32024 for the year 1897 recorded the birth of one Esther Wohman (Ex. 84; R. 681-682). The Department of Health could find no record of the birth of a Martin Collins in 1897 (R. 684-685). Frederick E. Webb, a handwriting expert (R. 525-526), testified that the certificate in the name of Martin Collins contained a forged signature and other writing which attempted to duplicate the writing of a person who filled out such certificates (R. 717-719).

The "Goldfus" certificate states that "Goldfus" was born on August 2, 1902, at 120 East 87th Street, the son of Emil Goldfus and Helen Trautwein, who were both born in Germany (R. 45, 85-86, 669, 680-681). A death certificate issued by the New York City Department of Health shows that an Emil Goldfus, of 120 East 87th Street, the son of Emil Goldfus and Helen Trautwein, who were both born in Germany, died on October 9, 1903 (Ex. 83; R. 48-49, 678-681).

38, 49, 665-666); (6) a piece of wood, wrapped in sandpaper, containing a cipher pad" (Ex. 88; R. 693-695); and (7) a hollowed-out wooden pencil containing microfilm (Ex. 87).⁹ The first four items were found during the search of the petitioner's room and his personal effects (R. 666-671). The fifth item was one of the three papers taken from the petitioner when he tried to put them up his sleeve (R. 65, 109, 665). The last two items were found in the wastebasket in the search of the vacant room after the petitioner had checked out of the hotel (R. 51, 694, 724, 726).

SUMMARY OF ARGUMENT

I

The government supports the legality of the search and seizure in this case on the ground that a search of

⁹ The FBI Laboratory's examination of this block of wood disclosed that it came apart and that inside it, rolled in thin paper and sealed with adhesive tape, was a small booklet of about 250 pages. On each page there appears a series of numbers in five-digit groups. In one section the numbers are printed in red, in another in black (R. 723-726).

¹⁰ The FBI Laboratory's examination of this pencil revealed that the eraser end was removable and the pencil itself hollow. In the pencil were 18 frames of microfilm (Ex. 97), one of which was a radio receiving schedule in the Russian language (Ex. 98), and another of which (Ex. 98-A) consisted of a letter in English addressed "Dear Dad" (R. 726-731). The pencil also contained other microfilmed letters in English and in Russian (Defense Ex. F; R. 734).

At the request of the Department of Justice, the Department of Defense instituted a radio monitoring operation at the times and on frequencies indicated on the radio schedule found in the pencil. As a result of the monitoring, on July 15 and August 4, 1957, coded messages in five-digit blocks were intercepted (Ex. 100; R. 746-753).

the person of an individual arrested, and of his immediate surroundings, is permissible as an incident of the arrest, and that items discovered in that search which would be the proper objects of a search warrant may be seized. These propositions are well established with respect to arrests in criminal cases. *Weeks v. United States*, 232 U. S. 383; *Harris v. United States*, 331 U. S. 145; *United States v. Rabinowitz*, 339 U. S. 56.

Under these holdings the legality of the search depends on the legality of the arrest. The petitioner here raises for the first time the legality of arrests under immigration warrants on the ground that they do not meet the conditions imposed by the Fourth Amendment on arrest warrants in criminal cases. But deportation proceedings have often been held by this Court not to be criminal cases. *Bilokumsky v. Tod*, 263 U. S. 149; *Carlson v. Landon*, 342 U. S. 524; *Harisiades v. Shaughnessy*, 342 U. S. 580. The use of administrative warrants in deportation cases has long received the tacit approval of the Court and in *Carlson v. Landon*, *supra*, the Court specifically upheld detention initiated by an immigration warrant and considered the nature of the warrant in some detail. What is essential to the validity of such an arrest is the very same factor which is controlling in passing upon the due process of deportation proceedings. The proceedings must be fair and give the alien an opportunity to defend his rights. But it is not necessary to engraft criminal procedures on what are concededly administrative proceedings.

The central question in this case is whether the rule permitting limited searches and seizures as incident to legal arrests should be considered applicable in deportation proceedings. The basis for the rule in criminal cases was to make the arresting power effective by protecting officers from injury by concealed weapons and to prevent escapes. Thus, the right to search does not depend on the nature of the proceeding, but on the right of the officer to take the person into custody and to hold him. That the power to search is not dependent on the warrant in a criminal case is demonstrated by the fact that, where it is legal to make an arrest without a warrant of any kind, the right of limited search has been upheld. *Carroll v. United States*, 267 U. S. 132; *Agnello v. United States*, 269 U. S. 20. There is equal necessity of permitting a reasonable search in deportation cases; the need is the same to protect the arresting officers and to prevent escapes.

The holdings that immigration proceedings are not criminal were made to explain the absence of the need for jury trial and of other rights guaranteed to defendants in criminal cases. It would be anomalous if these holdings were the basis for granting greater rights under the Fourth Amendment than are extended in criminal cases themselves.

The decisions of the two lower courts in this case that the search was legal and the evidence admissible is in accord with the only precedents in the field. *Diogo v. Holland*, 243 F. 2d 571 (C. A. 3); *DaCruz v. Holland*, 241 F. 2d 118 (C. A. 3); *Tsimounis v. Holland*, 132 F. Supp. 754 (E. D. Pa.), affirmed, 228 F.

2d 907 (C. A. 3); *Taylor v. Fine*, 115 F. Supp. 68 (S. D. Calif.). Assuming that the arrest is legal, immigration officers should be given the same right as other arresting officers to search the persons and immediate surroundings of the individuals arrested.

II

(a) The trial court's finding that the I. N. S. officers acted in good faith in conducting the search is supported by the record and should be accepted as conclusive. *Davis v. United States*, 328 U. S. 582, 593; *Harris v. United States*, 331 U. S. 145, 153. The evidence adduced below was uncontradicted that the search was conducted by I. N. S. officers and not by the F. B. I. The decision to arrest the petitioner on an immigration charge, and when to make the arrest, was made entirely by officials of I. N. S. Nor do the circumstances of admitted cooperation between the I. N. S. and FBI, or the alleged attempt of the FBI to enlist the petitioner in counter-espionage activities, serve to substantiate the petitioner's charge that the purpose of the I. N. S. search was to discover evidence of espionage. These two branches of the Department of Justice have not only the authority, but the duty, to cooperate in providing each other with information helpful in carrying out their respective duties. Moreover, the trial court found that the F. B. I. had not attempted to enlist the petitioner in counter-espionage activities, and that the cooperation solicited by the agents of petitioner was merely in answering their questions. In any event, even if the FBI had in fact sought to induce petitioner to become a counter-spy, this circumstance would not serve to negate the trial

court's finding of good faith. The burden of proof is on the party challenging the legality of a search and seizure to show that it was illegal. *Lotto v. United States*, 157 F. 2d 623, 626 (C. A. 8), certiorari denied, 330 U. S. 811; *Schnitzer v. United States*, 77 F. 2d 233, 235 (C. A. 8). The petitioner has failed to carry the burden on this case.

(b) The petitioner, having failed in the trial court to challenge the reasonableness of the seizure because of the quantity of the items seized, may not raise that issue initially in this Court. *United States v. Jones*, 204 F. 2d 745 (C. A. 7), certiorari denied, 346 U. S. 854; *Rodriguez v. United States*, 80 F. 2d 646 (C. A. 5). Actually, the issue was not only not raised; it was removed from consideration by stipulation. To permit the petitioner to raise this issue now in this Court would unfairly deprive the Government of an opportunity to respond. Cf. *Giordenello v. United States*, 357 U. S. 480, 488. Moreover, assuming the validity of the petitioner's claim, his failure to raise it before or during the trial deprived the trial court of the opportunity of avoiding the alleged error by suppressing the evidence sought to be introduced.

In any event, the record does not support the petitioner's contention that there was a general seizure of his property which would contravene this Court's decision in *Kremen v. United States*, 353 U. S. 346. The decision to give up the hotel room, following his arrest by I. N. S., to take his belongings with him and to abandon certain items, was made by the petitioner—not the I. N. S. officers. The removal of all of his belongings with him from the hotel room by the I. N. S.

officers, therefore, was not a "general seizure" of the type found in the *Kremen* case to be prohibited by the Fourth Amendment.

(c) Only seven of the items found in the petitioner's hotel room were introduced in evidence at the trial. Two birth certificates, an international certificate of vaccination, and a bankbook in the names of either Martin Collins or Robert Goldfus were properly seized by I. N. S. officers as an incident to the arrest because these documents were used by the petitioner to conceal his true identity and nationality and thus constituted the means and instrumentalities by which he continued to preserve the concealment of his initial illegal entry into the country and his continued illicit status herein. Cf. *Harris v. United States*, *supra*, 331 U. S. at 153, 154; *Agnello v. United States*, 269 U. S. 20, 30. The seizure of a code message which was taken from the petitioner by an I. N. S. officer when he tried secretly to conceal it up his sleeve was justified on two grounds. First, an arresting officer may search an arrested person to prevent the destruction of evidence. *Davis v. United States*, 328 U. S. 582, 609; *United States v. Rabinowitz*, 339 U. S. 56, 72. Secondly, the message appeared on its face to be an instrumentality of the crime of conspiracy to commit espionage and thus was properly subject to seizure since this Court has held that, where a search is conducted in good faith, officers need not ignore material related to crimes other than the one for which the person is being arrested, if the arresting officers come upon such material during the course of their search.

Harris v. United States, 331 U. S. at 153-155. The remaining two items (a cipher book and a hollowed-out pencil containing microfilm) were seized by FBI agents during a search conducted, with the consent of the hotel management, after the petitioner had vacated his room. The petitioner had previously thrown these items into a wastebasket (with the apparent intent of abandoning them) during the packing of his belongings, following his arrest. Since the petitioner had vacated the room when the search was conducted, and since the hotel management consented to the search, it was a legal one. *Davis v. United States*, *supra*, 328 U. S. at 593-594. Moreover, the petitioner has no standing to object to the seizure of these objects since he had clearly abandoned them by throwing them into a wastebasket. *Hester v. United States*, 265 U. S. 57; *Haerr v. United States*, 240 F. 2d 533, 535 (C. A. 5).

ARGUMENT

The basic proposition upon which the United States supports the legality of the search and seizure in this case is that when a legal arrest occurs it is not unconstitutional to make an appropriate search without a warrant of the person, and immediate surroundings, of the individual arrested, as an incident of the arrest, and also to seize articles which could be seized if the search were made pursuant to a warrant. This contention is founded on the decisions of this Court which firmly establish that very proposition with reference to searches incident to arrest in criminal cases. *Weeks v. United States*, 232 U. S. 383, 392; *Harris v. United States*, 331 U. S. 145; *United States v. Rabinowitz*,

339 U. S. 56. The central question here is whether the same rule applies when an arrest is made pursuant to an Immigration and Naturalization Service warrant in a deportation case. This problem we discuss in Point I, *infra*.

The petitioner also seeks to raise peripheral questions: (1) whether the search was made in good faith, as an incident of the arrest; (2) whether the seizure was unreasonable; and (3) whether the items introduced in evidence were the proper subject of seizure. These issues are discussed in Point II, *infra*.

I

OFFICERS OF THE IMMIGRATION AND NATURALIZATION SERVICE ARE AUTHORIZED, AS AN INCIDENT TO AN ARREST UNDER A VALID IMMIGRATION ARREST WARRANT, TO SEARCH THE PERSON AND IMMEDIATE SURROUNDINGS OF THE PERSON ARRESTED

A. ARREST PURSUANT TO AN ADMINISTRATIVE WARRANT IN A DEPORTATION PROCEEDING IS NOT ILLEGAL

If the arrest itself was illegal, then it is obvious that it is not possible to support upon it the legality of the search. *Giordenello v. United States*, 357 U. S. 480. As a preliminary matter, it is, therefore, necessary to examine the petitioner's argument (Br. 26-31), advanced here for the first time,¹¹ that the arrest itself

¹¹ Not only did the petitioner not urge illegality of the arrest as a ground for his motion to suppress, but, in arguing the motion, it was specifically conceded that the arrest was legal. R. 126-128. The petitioner did not assert illegality of the arrest in the court below and did not refer to it in his petition for certiorari here. It may well be that under these circumstances the Court will not wish to consider the issue as before it. Cf. *Giordenello v. United States*, 357 U. S. 480, 488; see *infra*, pp. 49-52.

was illegal because the warrant was not issued under the procedure prescribed by the Fourth Amendment.

With respect to the legality of the arrest, it is not argued that the issuance of the warrant was unauthorized by the statute (8 U. S. C. 1252, Appendix, *infra*, p. 63) or failed to comply with the Immigration and Naturalization Service regulations (8 C. F. R. 242.2 (a), Appendix, *infra*, pp. 63-64). The acting district director who signed the warrant exercised an informed judgment on the basis of detailed and reliable information indicating that probable cause for the deportation of the petitioner existed.¹² The warrant and the order to show cause why the petitioner should not be deported appear to be in proper form (R. 33-37) and were served on the petitioner at the time of his arrest (R. 140-141, 189). The petitioner's present attack on the arrest is that the statute and regulations could not constitutionally authorize administrative arrest warrants; in his view, the Constitution requires that, even in deportation cases, warrants for arrest be judicial warrants issued on the

¹² As is set forth more fully in the Statement, *supra*, pp. 8-13, the Immigration and Naturalization Service had before it detailed information from the statements of the petitioner's associate Hayhanen, which had been confirmed by an investigation by the FBI, that the petitioner was a deportable alien. This information was laid before Acting District Director Murff by Robert Schoenenberger, a supervisory investigator in the Washington office (R. 95, 107-108). After reviewing the information, Murff concluded that there was sufficient basis for the issuance of an order to show cause and a warrant of arrest, and accordingly he signed those documents (R. 95, 96, 108). The information relied on by Murff which had been received from the FBI is part of the record in this Court under seal (R. 236-238).

basis of sworn testimony as is required in criminal cases by the Fourth Amendment.¹³

This Court has specifically held that deportation proceedings are not criminal in nature and that the constitutional rights guaranteed defendants in criminal cases are not applicable to aliens in deportation cases. *E. g.*, *Bilokumsky v. Tod*, 263 U. S. 149; *Carlson v. Landon*, 342 U. S. 524; *Harisiades v. Shaughnessy*, 342 U. S. 580. These cases are based on the inherent nature of a deportation proceeding; the purpose is not to punish an alien, but physically to return him to his native land if his presence here has been determined by Congress to be undesirable. *Wong Wing v. United States*, 163 U. S. 228. Obviously, an alien cannot be physically removed from this country unless he is taken into custody—that is, arrested. While the procedures to be followed in these proceedings must be reasonable and must afford him an opportunity for a fair hearing, they are not the procedures required for a criminal trial.

Although this Court has not previously been asked to rule specifically on the application of the Fourth Amendment to warrants for arrest in deportation cases, it has for many years consistently upheld deportation proceedings which were in fact initiated in this manner (as were almost all deportation proceed-

¹³ Insofar as there is an implication that the arrest was not a *bona fide* step in effecting the deportation of the petitioner, the issue is merely a variant of the argument that the search of the petitioner's room was not an incident of the arrest, but was to support a criminal case for espionage. This argument is answered below, *infra*, pp. 39-47.

ings until recent years). *E. g., The Japanese Immigrant Case*, 189 U. S. 86, 97-99; *Bilokumsky v. Tod*, 263 U. S. 149; *Harisiades v. Shaughnessy*, 342 U. S. 580; *Galvan v. Press*, 347 U. S. 522. And in *Carlson v. Landon*, 342 U. S. 524, the Court specifically upheld the legality of holding an alien in custody pending deportation, although again the order taking him into custody was an administrative order rather than a criminal arrest warrant. However important it is to protect aliens from arbitrary action, there is no need to require that protections peculiar to the criminal law be engrafted on to the authorized administrative procedures long followed by the Immigration and Naturalization Service. Cf. *The Japanese Immigrant Case*, 189 U. S. 86; *Wong Yang Sung v. McGrath*, 339 U. S. 33.

Since the practice of using administrative arrest warrants in deportation cases is not intrinsically unfair and since Congress's authorization of the procedure has for a long time had at least the tacit approval of this Court, the petitioner has a heavy burden to overturn the long-established practice. We urge that he has not met that burden.

B. THE ESTABLISHED RULE PERMITTING THE SEARCH OF A PERSON LEGALLY ARRESTED AND OF HIS IMMEDIATE SURROUNDINGS SHOULD BE APPLIED TO AN ARREST PURSUANT TO A VALID IMMIGRATION WARRANT EXECUTED IN A DEPORTATION PROCEEDING

The fundamental basis for permitting a limited search without a search warrant in connection with a legal arrest is to make the arrest effective and to pro-

tect the officers from injury. Thus this Court stated in *Agnello v. United States*, 269 U. S. 20 at 30:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll v. United States*, 267 U. S. 132, 158; *Weeks v. United States*, 232 U. S. 383, 392.

If officers are to hold a person in custody, it is essential that they ascertain whether he has arms on his person or within easy reach. And such a search being not only appropriate, but absolutely necessary, it was an easy step to hold that officers are not required to overlook or discard contraband, the fruits of crime, or the means by which it is effected, when they are so discovered.¹⁴ In applying this rule, the Court has sanctioned the search of an area certainly as large as, and sometimes much larger than, the twelve by eight foot hotel room and adjoining bath here involved (R.

¹⁴ This view is comparable to the rule that when officers are merely attempting to execute an arrest, rather than making a search as such, and happen upon contraband, it may be seized. *Lore v. United States*, 170 F. 2d 32 (C. A. 4), certiorari denied, 336 U. S. 912; *United States v. Joines*, 258 F. 2d 471 (C. A. 3), certiorari denied, November 10, 1958, No. 360, this Term. *Marron v. United States*, 275 U. S. 192, is also comparable. There, officers making a search pursuant to a warrant came upon seizable articles not included in the warrant. The right to seize those articles was upheld.

140). *Marron v. United States*, 275 U. S. 192; *Harris v. United States*, 331 U. S. 145; *United States v. Rabinowitz*, 339 U. S. 56.

In emphasizing that the cases upholding such a search are limited to criminal cases, the petitioner overlooks the fact that the language of the holdings clearly indicates that it is not the nature of the proceeding which justifies the search without a warrant, but the fact that the officers are lawfully on the premises engaged in a lawful activity. The evidence is admissible because it is discovered in the course of a legal arrest. In *Weeks v. United States*, 232 U. S. 383, 392, the Court found that English and American law has always recognized:

* * * the right on the part of the Government * * * to search the person * * * when *legally* arrested to discover and seize the fruits or evidences of crime. [Emphasis added.]

In *Harris v. United States*, *supra*, at 150-151, the Court in the same vein pointed out:

Search and seizure incident to *lawful* arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States * * *. [Emphasis added.]

And, in *United States v. Rabinowitz*, 339 U. S. 56, it was said at 60:

Yet no one questions the right, without a search warrant, to search the person after a *valid* arrest. * * * Where one has been placed in the custody of the law by *valid* action of officers, it was not unreasonable to search him. [Emphasis added.]

The fact that the right to search in connection with an arrest does not arise from the arrest *warrant* is made very clear by the fact that where it is legal to make an arrest without a warrant, as where a felony is in progress, the incidental search has been upheld. *Carroll v. United States*, 267 U. S. 132, 158; *Agnello v. United States*, 269 U. S. 20, 30; cf. *Marron v. United States*, 275 U. S. 192. It is the legality of the arrest, not the authority given by the arrest warrant, that is important. The converse of the situation arose last term when the Court held evidence inadmissible which had been seized in the course of a search made as an incident to an arrest pursuant to an arrest warrant, but where the arrest was illegal because there was not sufficient basis for a finding of probable cause to support the warrant. *Giordenello v. United States*, 357 U. S. 480.

If the right of search exists when there is no warrant at all but the arrest is for other reasons legal, it would seem to follow that the limited search here involved should be upheld where a warrant has been issued in an administrative proceeding. The distinctions which the courts have drawn between deportation proceedings and criminal cases have been made in order to explain limitations on rights which would exist if the proceedings were criminal. *Harisiades v. Shaughnessy*, 342 U. S. 580, 594 (*ex post facto* clause inapplicable); *Carlson v. Landon*, 342 U. S. 524, 537 (no right to trial by jury). It would be anomalous to deduce from these cases that aliens arrested under immigration warrants have greater

rights under the Fourth Amendment than persons arrested on criminal charges.

Actually, the basis for upholding a search in deportation cases is precisely the same as that for upholding it in criminal cases. In order to make the arrest effective, to prevent escapes, and to safeguard the arresting officers, it is necessary that they make sure that the person arrested does not have available weapons or devices which would aid an escape. And it is equally reasonable that the officers should retain seizable items which turn up in such a search. The legality of the search should depend, as in criminal cases, on the legality of the arrest.

Both courts below decided in favor of the admissibility of the evidence on the same theory we advance. The trial court stated (R. 243):

* * * however I can think of no reason why a search made in connection with such an arrest as this should be regarded as any less valid than one based upon an arrest made in a proposed criminal cause.

And in its opinion the court below stated (R. 849):

With these similarities in mind, there would appear to be no basis for distinguishing between the right of government agents to conduct a search incident to a lawful arrest for commission of a crime and their right to conduct a search incident to a lawful arrest in connection with deportation proceedings. The grounds of public policy and convenience which justify the former are no less strong in the case of the latter.

The only other federal courts which have considered the power of Immigration and Naturalization Service agents to conduct a search incident to a lawful arrest in a deportation proceeding have recognized such power. In *Diogo v. Holland*, 243 F. 2d 571, and *DaCruz v. Holland*, 241 F. 2d 118, the Third Circuit, in *per curiam* orders, held that such searches were lawful and the evidence admissible. Earlier, the same court had affirmed without opinion a holding by the District Court that a search of the person of an alien arrested for deportation was legal. *Tsimounis v. Holland*, 132 F. Supp. 754 (E. D. Pa.), affirmed, 228 F. 2d 907. And in *Taylor v. Fine*, 115 F. Supp. 68, 70, n. 1 (S. D. Calif.), the court declared that "Incidental to a legal arrest whether with or without a warrant, the officers [I. N. S. agents] may conduct a reasonable incidental search."

For these reasons, we urge the Court not to hamper, and perhaps endanger, immigration agents in the course of their duties by restricting their right to act as other arresting officers do by making a search of the persons they arrest and the immediate surroundings.

THE SEARCHES OF THE PETITIONER'S HOTEL ROOM AND THE SEIZURE OF CERTAIN OBJECTS FOUND THEREIN WERE LAWFUL. CONSEQUENTLY, THE ADMISSION IN EVIDENCE OF CERTAIN OF THE SEIZED ITEMS WAS PROPER

A. THE TRIAL COURT'S FINDING THAT IN CONDUCTING THE SEARCH THE ARRESTING I. N. S. OFFICERS ACTED IN GOOD FAITH, WHICH FINDING WAS AFFIRMED BY THE COURT OF APPEALS, IS SUPPORTED BY THE RECORD, IS NOT CLEARLY ERRONEOUS, AND SHOULD BE ACCEPTED

The petitioner urges that "The evidence is overwhelming that the true objective of the search in the instant case was to uncover evidence of espionage, under the guise of a warrant of arrest pending deportation proceedings." (Br. 22.) "The Government cannot possibly claim" he says, "that FBI agents were seeking evidence of petitioner's status as a deportable alien" (*ibid.*).

But the evidence is uncontradicted that the search which was conducted incident to the petitioner's arrest was conducted by I. N. S. officers, not the FBI,¹⁵ and the I. N. S. officers testified, without contradiction, that the object of their search was the discovery (in

¹⁵ The mere fact that FBI officers were present during the search did not, of course, despite the petitioner's argument to the contrary (Br. 22), convert what was otherwise an I. N. S. search into an FBI search. It is true that the subsequent search of the petitioner's hotel room, which was carried out following petitioner's checking out and the removal of him and his baggage to the New York headquarters of the I. N. S., was by the FBI, but that search, which was conducted with the consent of the hotel management, was not an incident to the petitioner's arrest and he has no standing to object thereto (see *infra*, pp. 58-60).

addition to weapons),¹⁶ of documentary materials relating to the arrested person's identity and alienage (R. 65, 68, 102, 109-141, 150). The trial court, expressly addressing its attention to the requirement of "good faith" laid down in *Harris v. United States*, 331 U. S. 145, 153 (on which the petitioner so strongly relies, Br. 20-23), found that the search was carried out in good faith. 155 F. Supp. 8, 11. This finding was affirmed by the Court of Appeals after a "survey of the record", 258 F. 2d 485, 494-496. Unless it is so unsupported by the record that it is erroneous as a matter of law, such a finding should be accepted as conclusive. *Davis v. United States*, 328 U. S. 582, 593; *Harris v. United States*, *supra*, 331 U. S. at 153. Especially is this true since the finding was made after an extensive pre-trial hearing at which the petitioner had the opportunity of calling whatever witnesses he desired from the FBI and I. N. S. (see R. 170-172), and at which he himself, if he had chosen to do so, was, of course, at liberty to testify. Even more than in the case of most findings of fact, a finding on good faith depends on an evaluation by the fact-finder of the credibility of the witnesses.

Moreover, the record reflects all of the elements of good faith noted in the *Harris* case, *supra*, at 153-154—i. e., the search was not a general exploration but was specifically directed to the means and instrumentalities by which the petitioner had affected his illegal entry into the country and continued his illicit status here thereafter; the search which fol-

¹⁶ The officers' search for weapons was clearly proper. See *Harris v. United States*, 331 U. S. 145, 154.

lowed the arrest was appropriate for the discovery of such materials; there was nothing in the agents' conduct which was inconsistent with their declared purpose; and the objects sought for and those actually discovered were properly subject to seizure. See the summary of the facts in the Statement, *supra*, pp. 17-19; see also, *infra*, pp. 55-58. In addition, the evidence presented at the pre-trial hearing showed that, after receiving information from the FBI concerning the petitioner's alienage and deportable status, officials of the I. N. S. decided to issue a warrant for his arrest, further decided when they would make the arrest, and then proceeded to make the arrest and the search incident thereto, without participation therein by any FBI agent."

The petitioner's contentions are based primarily on the admitted cooperation between the I. N. S. and the FBI (Br. 15, 21-22) and his allegation that the FBI was attempting to enlist him in counter-espionage activities (Br. 11-13, 19). With regard to the

"The petitioner states (Br. 22) that the warrant "was served at their [the FBI's] direction". The evidence is perfectly clear, however, that this statement is true only in the sense that the FBI agents indicated to the I. N. S. officers that their interview with the petitioner in the hotel room had been concluded. The I. N. S., at the request of the FBI, had agreed to allow this interview before the I. N. S. arrested the petitioner (R. 97-99). This, however, was evidence of nothing other than the admittedly close cooperation which existed between I. N. S. and the FBI as each carried out its own special functions (see *infra*, pp. 41-42). The trial judge, on the basis of this evidence and the entire record before him, specifically found as a fact that the arrest was not made under the direction and supervision of the FBI (R. 244).

matter of cooperation, the FBI had, of course, the authority and even the duty as a law enforcement agency to give the I. N. S. the information it possessed concerning the petitioner's illegal entry and continued illicit status in this country, inasmuch as the enforcement of the immigration laws is peculiarly the concern of the I. N. S. The action of the I. N. S. in informing the FBI when the arrest would be made, and allowing the FBI to interview the petitioner before the arrest, shows only that the I. N. S. desired to avoid interfering with the FBI as each performed its proper functions. But the mere fact of such cooperation does not substantiate the petitioner's charge, in the face of the specific testimony to the contrary, that the purpose of the I. N. S. search was to discover evidence of espionage. As stated by the trial judge (155 F. Supp. at 11) :

No good reason has been suggested why these two branches of the Department of Justice should not cooperate, and that is the extent of the showing made on the part of the defendant.

See also the opinion of the Court of Appeals, 258 F. 2d 485, 495, n. 10.

With regard to the allegation that the FBI was attempting to enlist the petitioner in counter-intelligence activities, even were this the case the point would be completely irrelevant. The only issue here is whether the purpose of the I. N. S. search was to discover documentary materials relating to the petitioner's status as a deportable alien or to discover evidence of espionage. See 258 F. 2d at 494. There is no greater likelihood that the I. N. S. investigators

were searching for evidence of espionage if the FBI was hoping to enlist the petitioner in counter-espionage than if the FBI was merely investigating and seeking to uncover the full extent of his past espionage activities. In any event, the trial court found that the FBI had not attempted to enlist the petitioner in counter-espionage activities, 155 F. Supp. at 11. It is clear from the evidence (*ibid.*), and the trial court so found (155 F. Supp. at 10), that the cooperation solicited was merely in answering the agent's questions. Moreover, the instructions to the I. N. S. investigators for the arrest of the petitioner (R. 102, 138) were not contingent on whether the petitioner cooperated (R. 140, 148).

The petitioner argues that the administrative arrest warrant, pursuant to which his arrest was effected, was issued "at the request of the FBI" (Br. 21-22). He cites four record references as support for that statement—R. 75, 76, 163, 164. The latter two references are to the testimony of I. N. S. investigator Kanzler that he "drew up" the arrest warrant and show cause order pursuant to the instructions of Mr. Noto, the I. N. S. Deputy Assistant Commissioner for Special Investigations (R. 198). The only conceivable support for the petitioner's statement to be found on these two pages is Kanzler's testimony that the instructions referred to were given in the offices of the FBI (R. 163-164). But it is undisputed, as we have seen, that the I. N. S. and the FBI were in communication with each other regarding the petitioner prior to the latter's arrest, and that the two services cooperated closely with each other as each

carried out its own respective functions *vis-à-vis* the petitioner. Consequently, the fact that Mr. Noto's instructions to Mr. Kanzler were given in the FBI offices provides no support for the petitioner's assertion. Furthermore, there is an abundance of direct testimony to the effect that the decision to issue the warrant for the petitioner's arrest was the I. N. S.'s own (R. 95-96, 108, 163, 200, 203, 207, 217-218, 220, 223-224).

The first two references, *supra*—R. 75 and 76—are to a newspaper article which attributed to the I. N. S. Commissioner statements to the effect that the I. N. S. arrested the petitioner "at the specific request of 'several government agencies'" (R. 75) and that the petitioner would not have been arrested by the I. N. S. if "American counter-intelligence had not requested it" (R. 76). Though the article was published some two months prior to the hearing on the motion to suppress (R. 4, 75), the petitioner did not subpoena either the Commissioner or the author of the article to testify at the hearing, nor did he, in bringing the article to the attention of the court following the close of the hearing, request that the hearing be re-opened for the purpose of introducing testimony by either.¹⁸ Under the

¹⁸ The article was brought to the court's attention on October 11, 1957 (155 F. Supp. at 8, 12), two days following the close of the hearing (R. 4), by the petitioner's associate defense counsel, Mr. Fraiman, who stated in an affidavit (R. 74-75) executed the preceding day, October 10th, that he had learned on that day of General Swing's statement to the press of two months earlier (R. 74). The affidavit further stated that the author of the newspaper article had told the affiant that he was personally willing to sign an affidavit attesting to the truth and

circumstances, there was, as the Court of Appeals pointed out (258 F. 2d at 495), "no reason why the trial judge should have credited this multiple hearsay" contained in a newspaper article, as against the sworn testimony of the several I. N. S. officials, given at the hearing, concerning the circumstances leading up to the petitioner's arrest.¹⁹

The petitioner further contends (Br. 23-25) that the initial decision of the Department of Justice to proceed against him as a deportable alien under the immigration laws, rather than as a spy under the espionage statutes, and to effect his arrest under an administrative warrant, issued by and returnable to itself, was made to avoid public process. He thus claims that the search and seizure which followed the arrest was a "subterfuge", "equivalent to the use of clandestine stealth" (Br. 23).

His claim that the procedure utilized was done to avoid public process, however, is completely unsupported by the record. On the contrary, the reasons

accuracy of the article in reporting General Swing's statements but that counsel to the newspaper had refused to permit it as a matter of policy (R. 74). Mr. Fraiman further stated that the petitioner would have no objection to the Government's submitting an affidavit by General Swing "denying the truth of the quoted matter attributed to him" in the article, or to a government request that the hearing be reopened to have General Swing testify (R. 75).

¹⁹ The trial court's opinion on the motion to suppress was delivered on October 11, 1957 (R. 4, 155 F. Supp. 8), the day on which Mr. Fraiman's affidavit was filed. The court, after acknowledging that the affidavit had been read and considered, stated that its contents did not, in the judgment of the court, "enhance the arguments for the defense" as previously set forth in the opinion (155 F. Supp. at 12).

why, on June 19, 1957, the Department of Justice had decided to proceed under the immigration laws rather than the espionage statutes are fully explained in an affidavit (R. 55-62) submitted by associate government counsel below, filed in opposition to the petitioner's motion to suppress and contrary to the petitioner's present contentions. The affidavit asserts that on June 18 and 19, 1957, two attorneys of the Internal Security Division of the Department of Justice interviewed the principal government witness in this case, who was a co-conspirator of petitioner and thus could invoke his privileges under the Fifth Amendment if called upon to testify against his will. At this time, the witness "absolutely refused" to testify in a public proceeding for fear of reprisals which he claimed would be taken by the U. S. S. R. against his family who were still living in that country (R. 57). Under these circumstances, the Internal Security Division concluded on June 19, 1957, that the available evidence was insufficient to proceed against the petitioner under the espionage statutes. It is stated unequivocally in the affidavit that "[h]ad the witness been willing to testify, the * * * [Department of Justice was] prepared as of June 19, 1957, and fully intended, to take the necessary legal steps to secure a warrant and effect the arrest of Petitioner on espionage charges" (*ibid.*). This assertion is uncontradicted by any evidence in the record. Moreover, the subsequent decision to proceed ~~under~~ the espionage statutes was made possible only after the belated decision of the previously reluctant witness to testify (R. 58). Under these circumstances, we submit that the procedure fol-

lowed in this case with respect to the petitioner's apprehension was not at all the "subterfuge" asserted by him.

The petitioner relies (Br. 23-24) on *Gouled v. United States*, 255 U. S. 298, but that case is clearly inapposite. There, the Court held that evidence obtained by stealth was equivalent to the obtaining of evidence by force and coercion and was likewise prohibited by the Fourth Amendment. The documents seized in *Gouled* were, in effect, stolen by an officer of the government. In contrast, the I. N. S. officers here entered the petitioner's hotel lawfully to arrest him under the authority of a valid immigration arrest warrant, and the search and seizures that ensued were an incident to a valid arrest.

The burden of proof is on the one challenging the legality of a search and seizure to show that an illegal search and seizure has occurred. *Lotto v. United States*, 157 F. 2d 623, 626 (C. A. 8), certiorari denied, 330 U. S. 811; *Schnitzer v. United States*, 77 F. 2d 233, 235 (C. A. 8); cf. *Nardone v. United States*, 308 U. S. 338, 341. We submit that the petitioner, on this record, has failed to carry that burden.

B. THE PETITIONER, HAVING FAILED TO OBJECT THAT THE SEIZURE WAS UNREASONABLE BECAUSE OF THE QUANTITY OF ITEMS TAKEN FROM HIS HOTEL ROOM FOLLOWING HIS ARREST, PRIOR TO OR AT THE TRIAL BELOW, MAY NOT RAISE THAT ISSUE INITIALLY BEFORE THIS COURT. IN ANY EVENT, THE RECORD ESTABLISHES THAT ONLY A LIMITED NUMBER OF ITEMS WERE ACTUALLY "SEIZED" BY THE I. N. S. OFFICERS

At the hearing on the motion to suppress made by the petitioner before trial, his objections to the search of his hotel room by officers of the I. N. S. on June 21,

1957 and the seizure of certain objects found therein were limited to (1) the alleged lack of authority of I. N. S. officers to conduct a search of the person, and the surrounding area under the control, of an individual arrested, as an incident to a valid arrest under an administrative immigration arrest warrant and (2) assuming the authority to search in these circumstances, that the *search* was unreasonable because it was conducted in bad faith—its true objective allegedly being to discover evidence of the petitioner's espionage activities and not material pertaining to the matters contained in the immigration warrant (R. 116, 125, 126-127, 128, 129-130, 152, 154, 171, 227; see also 155 F. Supp. 8, 10). No objection was raised by the petitioner at that time that the seizure was unreasonable because of the quantity of the items seized. Actually by stipulation the petitioner removed from consideration all but approximately 26 items (R. 79-90, 225-226).²⁰ Similarly, in his brief in the Court of Ap-

²⁰ At the commencement of the hearing on the motion to suppress, government counsel advised the court that the Government laid claim to only twenty-three items taken from petitioner's hotel room by I. N. S. agents (R. 80-82, 84-86). Moreover, though all of the items found in the hotel room were included in the petitioner's list of items "seized" (contained in Exhibits C and D to his affidavit in support of the motion to suppress (R. 37-46)), his counsel conceded at the hearing that many of the articles included therein were "wholly unrelated to the case" (R. 79) and that "there is no dispute between the government and ourselves" (R. 80) with respect to these items. The petitioner's counsel thereafter consented to have these items stricken from the motion by stipulation (R. 79-90) after the trial judge pointed out that "I want to make it quite clear that those undisputed items are not deemed to be embraced in the motion" (R. 80). The court's additional statements that

peals, though the petitioner argued (Brief of Appellant, pp. 13-14) that the "seizure was unreasonable, because the items seized did not relate to the immigration warrant which was the basis of the search" (*id.*, at 13), it is abundantly clear that his objection was limited to the items seized which were introduced in evidence at the trial and did not embrace the contention that all of his personal effects which were taken with him to I. N. S. headquarters after his arrest were "seized". Consequently, neither the trial court nor the Court of Appeals had an opportunity to decide the legality of the search and seizure on the basis of the scope of seizure. See 155 F. Supp. 8; 258 F. 2d 485, 492-497. In fact, both courts correctly assumed that the petitioner conceded that the seizure was a limited one. See 155 F. Supp. at 11-12; 258 F. 2d at 492, 495-497.

The petitioner now contends (Br. 25-26), for the first time, that the seizure was unreasonable because "[h]is living quarters were literally stripped of all he possessed", making scattered reference to the fact that all of his personal effects found in the hotel room, consisting of over 200 items, were "seized" (see Br. 6, 9, 16, 22, 25) in an attempt to raise the issue decided by this Court in *Kremen v. United States*,

the agreement between the parties concerned a "return" of property in the custody of the government (R. 86, 226) cannot be construed to contradict the specific understanding that the items were deemed stricken from the motion. In view of the grounds of illegality which were being urged (see text above), the stricken items became irrelevant to any issue before the court so that it must have disregarded them, not only with respect to their return to the petitioner, but also with respect to the relationship of their seizure to the legality of the seizure of the remaining items.

353 U. S. 346. We submit that the petitioner, having failed to object to the scope of the seizure in the trial court and having relied exclusively on other grounds in support of his claim that the search of his hotel room and seizure of items found therein were in violation of the Fourth and Fifth Amendments of the Constitution, may not seek reversal of his conviction, obtained on the basis of overwhelming evidence of guilt, by raising the objection initially in this Court. In the absence of a valid objection in a criminal prosecution, the defendant may not raise an objection for the first time on appeal. Rule 51, F. R. Crim. P.; *Az Din v. United States*, 232 F. 2d 283 (C. A. 9), certiorari denied, 352 U. S. 827; *United States v. DeMarie*, 226 F. 2d 783 (C. A. 7), certiorari denied, 350 U. S. 966; *Wheeler v. United States*, 165 F. 2d 225 (C. A. D. C.), certiorari denied, 333 U. S. 829. Similarly, the failure to make a timely assertion of a constitutional right before a tribunal having jurisdiction to determine it may result in its forfeiture. *Yakus v. United States*, 321 U. S. 414, 444-445.

Moreover, the requirement of making timely objection is applicable not only in cases where no objection was raised at the proper time, but also where the objection, though urged at the proper time, did not include the specific ground relied upon on appeal. See 1 Wigmore, *Evidence* (3d ed., 1940) § 18. This principle is, of course, applicable in cases where the legality of searches and seizures have been challenged. Thus, in *United States v. Jones*, 204 F. 2d 745 (C. A. 7) certiorari denied, 346 U. S. 854, the defendant made a timely objection, by motion to suppress before

trial, on various specified grounds, to the legality of a search and seizure by government officers incident to an arrest. On appeal, he urged as an additional ground for the illegality of the search and seizure that the officers making the arrest and the search incident thereto had no authority to make the arrest. The Court of Appeals refused to consider this argument, explaining (at p. 749):

The rule that an appellate court will not notice errors not brought to the attention of the trial court is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. * * *

Cf. *United States v. DiRe*, 332 U. S. 581, 588. And, to the same effect, see *Rodriguez v. United States*, 80 F. 2d 646, 647-648 (C. A. 5).

This Court has recently had occasion, in a search and seizure case, to decline consideration of "belated contentions" based on a "new theory" urged for the first time in this Court where the facts relied upon by the party suggesting the new theory "were fully known to it at the time of trial, and there are no special circumstances suggesting such an exceptional course." *Giordenello v. United States*, 357 U. S. 480, 488. The Court explained that to permit the raising of issues initially at this stage would unfairly deprive the opposing party of an adequate opportunity to respond (*ibid*). Though the *Giordenello* case involved a contention raised by the Government initially before this Court, its principle applies with equal force to the belated objection raised by the petitioner

in the instant case. The petitioner's failure to challenge the validity of the search and seizure, at the hearing on the motion to suppress before trial, on the ground that the seizure was unreasonable because all of his personal effects were "seized" deprived the Government of the opportunity to rebut the contention by cross-examination of the petitioner's witnesses or by offering its own evidence at the hearing to show the actual scope of the seizure. Moreover, assuming the validity of the petitioner's claim, his failure to raise it before or at the trial deprived that court of the opportunity of excluding the evidence allegedly illegally seized and thus of avoiding error. Having failed to do so, we submit that he cannot raise it in this Court and obtain reversal of his conviction on the basis of an alleged error which he himself could have prevented by timely objection.

However, regardless of the untimeliness of the petitioner's objection, there is no basis for the present contention that the seizure was unreasonable because all of his personal effects found in his hotel room were taken with him to I. N. S. headquarters following his arrest; and likewise his new-found reliance on this Court's decision in *Kremen v. United States*, 353 U. S. 346, is misplaced.

The *Kremen* case, *supra*, involved the search and seizure of the entire contents of a six-room residence, as an incident of a valid arrest of the defendants. Some of the items seized were introduced at the trial against the defendants. In reversing their convictions, this Court pointed out (at p. 347) that:

The seizure of the entire contents of the house and its removal some two hundred miles away

to the FBI offices for the purpose of examination are beyond the sanction of any of our cases. * * *

In contrast, the record in this case fails to establish that the bulk of the items which were taken with the petitioner to I. N. S. headquarters by the I. N. S. officers following his arrest were "seized" within the meaning of that term as used in the Fourth Amendment. Rather, the circumstances under which the record reflects that these items were removed from the petitioner's hotel room are shown to have arisen from necessity and the convenience of both the petitioner and the arresting officers.

The petitioner was a transient who, at the time of his arrest, had been living at the Hotel Latham for approximately one month (Ex. 76; R. 657-658). Prior thereto, he had lived at other hotels for short periods of time (Exs. 74, 75; R. 635-636). Shortly after his arrest, I. N. S. officers Schoenenberger, Kanzler, Farley, and Boyle made a "superficial examination" of the petitioner's effects found in his hotel room in order to discover documents relating to his identity and nationality (R. 68, 103). At that time, the petitioner was asked by Kanzler "what he wanted done about his hotel room" (R. 167) and the petitioner, after learning that he was to be taken to I. N. S. headquarters in New York City, replied "Well, I guess I might as well check out of the hotel." (R. 167). Schoenenberger then asked the petitioner whether he wanted to take his personal effects with him (R. 109). The petitioner replied that he did "with some reservations" (R. 109). The I. N. S.

officers thereafter proceeded to assist him in packing his belongings (R. 65, 109). During the course of the packing, the petitioner was allowed to choose—and did choose—what he wanted to take with him and what he wanted to leave behind (R. 109, 112). He discarded certain items without objection by the I. N. S. officers, including some jars of painters' supplies, a handful of pencils, several packages of Kleenex tissue and other articles (R. 109, 114, 242, 663). At one point during the packing, the petitioner asked specifically whether he would be given access to a carton of cigarettes if he took them along and was told by Schoenenberger that he would have access to them and that “[h]e could take anything that he wanted” (R. 112).

The decision to take the bulk of his belongings with him, to check out of the hotel room, and to abandon certain items, was made by the petitioner, *not* the I. N. S. officers. The record fails to indicate that the latter would have taken the bulk of these items had the petitioner desired otherwise. Moreover, it appears from the record that the petitioner was to have access to any of his personal belongings which he desired and that it was not the intent of the officers, in taking them with the petitioner to I. N. S. headquarters, to “seize” all of them.

This conclusion is strengthened by the subsequent actions of the Government and the petitioner's counsel. Two weeks before the hearing on the motion to suppress, the petitioner's counsel was advised by the Government that it was willing to return the bulk of the material involved but was asked by the peti-

tioner's counsel to retain it because the latter had no place to store it (R. 79).

C. EACH OF THE ITEMS INTRODUCED IN EVIDENCE WAS SUBJECT TO SEIZURE DURING A PROPER SEARCH

A total of seven items found in Room 839 of the Latham Hotel were introduced in evidence.²¹ Of these, five were seized by the I. N. S. officers during the search which they conducted as an incident to their arrest of the petitioner, and two were seized in the subsequent search of the vacated hotel room by the FBI agents after the petitioner had checked out of the hotel and been transported with his baggage by the I. N. S. officers to the New York headquarters of the I. N. S. It is necessary to discuss these two groups of evidence separately.

(1) *The items seized by the I. N. S. officers during the search incident to the petitioner's arrest*

Of the five items (which became trial exhibits) seized by the I. N. S. officers in the course of their search of the petitioner and his hotel room as an incident of his arrest, four, to use the language of the trial court in denying the motion to suppress (155 F. Supp. 8, 11), "cannot be characterized as other than instrumentalities which were appropriate for employment by the defendant in the preservation of the false

²¹ Thus, at the time of the motion to suppress, the petitioner objected to the seizure of the entire list of his personal belongings (R. 20-21). During the course of the proceedings, agreement was reached that dispute existed as to only 26 items (R. 79-90, 225-226, *supra*, p. 48). Of the 26 items which the court refused to order returned or suppressed, the government introduced seven in evidence and it is with respect to these seven that the petitioner's present argument, that their seizure was illegal because they do not relate to the deportation proceeding, relates.

position that he had elected to create and continue to occupy" for the purpose of concealing, by "clandestine coloration," his initial "illegal entry into this country", and his continued "illicit status" herein. These were the two birth certificates in the names of Emil Robert Goldfus and Martin Collins, respectively, the certificate of vaccination in the name of Martin Collins, and the bankbook in the name of E. R. Goldfus (see *supra*, p. 22). The petitioner used these four documents for the purpose of providing himself with a new identity and nationality,²² thereby concealing his actual identity and nationality, which was essential to the maintenance of his illegal status in this country. These four items, therefore, were properly seizable by the I. N. S. officers under the same general principle which permits arresting officers, when making an arrest on criminal charges, to seize, as an incident of the arrest, "the means and instrumentalities by which the crimes charged had been committed," *Harris v. United States*, *supra*, 331 U. S. at 153, 154; *Agnello v. United States*, 269 U. S. 20, 30. Certainly, the documents and papers seized were as much instrumentalities and means whereby the petitioner sought to conceal his illegal presence in this country as the ledgers and bills seized in *Marrón v. United States*, 275 U. S. 192, 193, were instrumen-

²² Of the two birth certificates, one was forged (R. 717-719) and one was for a child dead over fifty years (Ex. 83; R. 48-49, 678-681). To receive the certificate of vaccination, the petitioner represented himself as Martin Collins (R. 598-599). The identity of Emil Goldfus was used by the petitioner in obtaining the bankbook. The petitioner used both names at different times (*e. g.*, Exs. 71, 72, 73, 74, 75; R. 630-636).

talities of the crime (there involved) of conspiracy to violate the National Prohibition Act. Similarly, in *United States v. Lindenfeld*, 142 F. 2d 29, 832 (C. A. 2), it was held that, incident to an arrest for the illegal distribution of narcotics, law enforcement officers lawfully seized cards allegedly showing the names and addresses of the defendant's customers:

* * * [T]he cards were more than mere evidence of the crime. *They were the means through which defendant hoped to cover up his illegal acts, and thus were a vital factor in the criminal enterprise itself.* * * * [Emphasis added.] ²³

The fifth item found during the search by the I. N. S. officers was the code message taken from the petitioner when he tried secretly to conceal it up his sleeve (see *supra*, pp. 19, 22). This message was subject to seizure on two grounds. First, even under the narrowest interpretation of the legitimate bounds of a proper search incidental to a valid arrest, it is conceded that arresting officers may search the arrested person to prevent the destruction of evidence. *Davis v. United States*, 328 U. S. 582, 609; *United States v. Rabinowitz*, 339 U. S. 56, 72. Secondly, the message appeared on its face to be an instrumentality of the crime of conspiracy to commit espionage (of which the arresting officers were aware that the peti-

²³ See also *Honig v. United States*, 208 F. 2d 916, 920 (C. A. 8), where it was held that, as an incident to a valid arrest for impersonating a federal officer, the seizure of a rubber stamp used to make an imprint on a false identification card was proper on the ground that the stamp was a means used by the defendant to effect his unlawful impersonation.

tioner was suspect). This Court has held that if a search (incident to a valid arrest) is made in good faith for instrumentalities of the offense for which the suspect was arrested, the officers need not ignore material related to other crimes which they come upon. *Harris v. United States, supra*, 331 U. S. at 153-155; see also *Kelly v. United States*, 197 F. 2d 162, 164 (C. A. 5); *United States v. Braggs*, 189 F. 2d 367, 369 (C. A. 10). Although these cases involve the seizure of property possession of which is itself a crime, *i. e.*, contraband, as the Court of Appeals pointed out (258 F. 2d 485, 496-497), there is no reason to distinguish such property from the instrumentalities of an offense, *e. g.*, a murder weapon. Both types of property are subject to seizure in a good faith search for materials related to the offense for which the subject was arrested. And both should be equally subject to seizure when the arresting officers come upon them in a good faith search, even though they relate to a different offense. In the instant case, the seizure of the code message resulted directly from the petitioner's action in attempting to conceal it, and not from any effort of the searching officers to find materials other than documentary evidence of the arrested person's alienage and identity.

(2) *The items seized by the FBI during the later search of the petitioner's vacated room*

Two items were received in evidence which were seized by agents of the FBI during their later search of the petitioner's vacated hotel room with the permission of the hotel management. These were a cipher book and a hollowed-out pencil containing microfilm (see *supra*, pp. 21, 23). These items were taken

from the wastebasket into which the petitioner had voluntarily discarded them after he was given the opportunity to decide which property he wanted to pack and keep and which property he wanted to discard or leave behind. The fact that the petitioner discarded these items into the wastebasket, rather than merely leaving them elsewhere in the room as he did some other items, evidences his desire to be rid of them and his intent to abandon them. As stated by the trial judge (Transcript, p. 437):

The act of putting them in the scrap basket by an intelligent person, and I am satisfied that this defendant is intelligent is not consistent with the purpose to retain ownership.

He was sufficiently. * * * in possession of his reasoning powers, and his faculties to know that if he wished to retain anything the thing to do is to put it in his suitcase; that is what he did with the other things.

See also Transcript, p. 425.

Moreover, the petitioner had permanently vacated the room when the search in which these items were seized was conducted. Although the hotel's "check-out" time was 3 p. m., all that that meant (the evidence is clear) was that the petitioner was entitled to the use of the room until that hour (without incurring an additional day's rent) if he retained possession of the key till that time and did not in fact vacate the room by removing all his effects therefrom (*supra*, p. 20). But, as the hotel manager testified, once petitioner paid his bill, turned in his key, and took out his baggage, he was no longer entitled to the room, which was then available to be rented to another guest (R. 659-661).

Since the petitioner had vacated the room, and since the FBI's search of the room was with the specific consent of the hotel management, the search was entirely legal. *Davis v. United States*, *supra*, 328 U. S. at 5983-594; *Reszutek v. United States*, 147 F. 2d 142 (C. A. 2). Furthermore, the petitioner had clearly abandoned the items which he discarded into the wastebasket, and it is settled that a person has no standing to object under the Fourth Amendment to the seizure of materials which he has abandoned. *Hester v. United States*, 265 U. S. 57; *Haerr v. United States*, 240 F. 2d 533, 535 (C. A. 5); *Lee v. United States*, 221 F. 2d 29 (C. A. D. C.); *Newingham v. United States*, 4 F. 2d 490, 493 (C. A. 3), certiorari denied, 268 U. S. 703.²⁴

²⁴ The petitioner also complains of the subsequent searches, pursuant to search warrants, of two rooms leased by him in the building located at 252 Fulton Street in Brooklyn (Br. 17; Br. App. 44, 45). He states that the search warrants which were issued for the search of these rooms were "[b]ased upon" the two searches of the petitioner's Latham Hotel room (Br. 17). Nothing which was seized in one of the two rooms at 252 Fulton Street (Room 505), however, was received in evidence. With regard to the search warrant authorizing the search of the other room (Room 509), while the affidavit of application (R. 264-266) referred to the petitioner's arrest by I. N. S. officers at the Latham Hotel (R. 265), and, in addition, referred specifically to one of the items taken from the wastebasket of the hotel room during the FBI's search of the room following the petitioner's checking out of the hotel (R. 265), the application also referred, *inter alia*, to the supervening indictment of the petitioner charging him with conspiracy to commit espionage by secreting microfilmed messages in hollowed-out objects such as pencils and coins (R. 264-265). It is thus not at all clear that the validity of this search warrant would necessarily depend upon the validity of the searches of the hotel room. In any event, as we have shown in the text, the searches of the hotel room were not invalid.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

8 U. S. C. 1103 (a), 1251 (a) (5), 1252 (a), 1305, and 1306, provide in pertinent part as follows:

§ 1103. Powers and duties of the Attorney General and Commissioner; appointment and compensation of Commissioner.

(a) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers * * *. He is authorized, in accordance with the civil-service laws and regulations and the Classification Act of 1949, to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter; he may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon any other employee of the Service. * * *

§ 1251. Deportable aliens—(a) General classes.

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * * *

(5) has failed to comply with the provisions of section 1305 of this title unless he establishes

to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful, * * *

§ 1252. *Apprehension and deportation of aliens—*
 (a) *Arrest and custody; review of determination by court.*

Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. * * *

§ 1305. *Change of address.*

Every alien required to be registered under this subchapter, or who was required to be registered under the Alien Registration Act, 1940, as amended, who is within the United States on the first day of January following the effective date of this chapter, or on the first day of January of each succeeding year shall, within thirty days following such dates, notify the Attorney General in writing of his current address and furnish such additional information as may by regulations be required by the Attorney General. * * *

§ 1306. *Penalties—(a) Willful failure to register.*

Any alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application or to be fingerprinted, * * * shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not to exceed \$1,000 or be imprisoned not more than six months, or both.

8 C. F. R. 242.2 (a) provides in pertinent part as follows:

At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to

supervision under the authority contained in section 242 (d) of the act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest issued by a district director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. * * *

JAN 15 1959

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958.

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,

Petitioner.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958.

RUDOLF IVANOVICH ABEL, also known as "Mark" and also
known as Martin Collins and Emii R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

The twenty-page Government statement of facts attests to the accuracy of our narrative of the pertinent events (Our Brief, pp. 3-8).^{*} The Court is reminded that all facts set forth in our brief were taken exclusively from statements by U. S. Government officials and witnesses, or were uncontradicted in the District Court.

Several of the Government's legal arguments require a reply, however, since they manifest a misunderstanding

^{*} The difference in emphasis is due to our accepting as truthful the testimony of all F. B. I. agents and the arresting I. N. S. officers, whereas the Government prefers to emphasize the self-serving statements of an I. N. S. administrative official named Noto, a final witness so remarkable that he knew Petitioner's name to be Abel before either Hayhanen or the F. B. I. (200-201, 174, 289).

of the record and a misconception of what we have contended from the outset of this case.

The "Arrest" of Abel.

The Government argues at great length that "the legality of the search depends on the legality of the arrest" and that since Abel was lawfully detained for deportation any search was permissible and anything seized could be used as evidence in prosecuting him for any crime (Their Brief, pp. 23-26, 29-38). Their contention thus is that a person suspected of being an alien illegally in the United States, is wholly unprotected by the Bill of Rights.

This entire chain of reasoning rests on a false premise which may be mumbled, "an arrest is an arrest is an arrest." The truth is that what the Government termed an "arrest *sui generis*" in its District Court briefs is not an arrest at all, either civil or criminal. It is a detention process, whereby a person is taken into custody for the sole and expressed purpose of deportation from the United States. Yet the Government's basic reasoning, and the applicability of the case authority cited in its brief, rest upon the misleading assertion that there was a "valid arrest" in the case at bar.

Thus, too, the Government weaves back and forth in an elaborate defense of its process for deportation (the legality of which we have never disputed) and then leap-frogs to the unwarranted conclusion that process appropriate for deportation is also appropriate to obtain evidence of a capital crime—even when the arresting officers admittedly were convinced that such a capital crime had been committed but had decided to avoid regular criminal procedures at that time (Their Brief, pp. 5, 6, 46).*

* As to some rights of persons detained under an administrative I. N. S. warrant, see Appendix to this Brief.

So far does the Government distort our contentions that it even states (Their Brief, p. 31) that we urge that "the Constitution requires that, even in deportation cases, warrants for arrest be judicial warrants issued on the basis of sworn testimony as is required in criminal cases by the Fourth Amendment." This of course is nonsense. Our original contention, advanced in our motion papers in the District Court (R. 25-27), is again set forth in Point II of our brief here in which we state (at page 30):

"An administrative procedure such as that employed by the Department of Justice in the case at bar, under which the Attorney General is accountable only to himself, without any of the safeguards discussed above, *cannot and should not be the basis for a search and seizure of a man and his effects to procure evidence for use in the prosecution of a capital crime.* . . ." (Italics supplied.)

In short, at all times our contentions have been limited to the precise issues presented in the case at bar.

Decision Not to Obtain a Warrant.

In our principal brief we have shown that the search in the case at bar lacked "good faith" as defined by this Court and cannot be sustained under the rule in *Harris v. United States*, 331 U. S. 145 (1947). The entire answering argument of the Government is based upon their assertion that they could not obtain a criminal arrest warrant because the accomplice Hayhanen, although "cooperating", refused to testify later at a public trial (Their Brief, pp. 5, 6, 45-47).

This, we submit, is no answer at all. First, the more obvious reason for secret detention (to try to persuade Abel to aid the United States) is discussed at length in our brief (pp. 11-16). Second, there can be no question but that the Department of Justice on June 21, 1957 possessed more

than enough information to obtain a criminal warrant, based upon probable cause. (Exhibit "B", Our Brief; Their Brief, pp. 5, 6, 45-47). The statement that a cooperative informant refused to testify in public proceedings has no bearing on this issue. *Brinegar v. United States*, 338 U. S. 160 (1949) at pages 174-176; *Weise v. United States*, 251 F. 2d 867, (9th Cir., 1958), *cert. denied* 357 U. S. 936 (1958).

Even if we assumed that the Department of Justice's reason for not securing a warrant was because Hayhañen refused at that time to testify later at a public trial, the argument in the Government's brief confuses two entirely separate concepts: (1) Did they then have sufficient information to obtain a warrant?; and (2) Did they then have sufficient evidence to prosecute successfully and obtain a conviction? It is obvious that only the first consideration is germane to the issues in this case. The Government cannot justify its failure to seek a warrant of arrest upon the ground that, although it had probable cause to believe that a crime had been committed, it was dubious of a successful prosecution. *United States v. Bianco*, 189 F. 2d 716, 721 (3rd Cir., 1951)

The Kremen Case.

At various aching joints in its brief (pp. 30, 48-51) the Government utters a rather plaintive lament that in this Court it has met for the first time some arguments and case authorities in support of our position--unqualified from the outset--that the searches and seizures in this case violated the Fourth and Fifth Amendments. Yet in the case at bar, the basic contentions of Petitioner in his original motion papers are identical with those advanced in this Court. The motion papers (Record, p. 21) asked for an order of the District Court:

"Directing the Respondent, United States of America, to return and to suppress for use as evidence any and all property seized on the 21st day of June, 1957 in Room 839, Hotel Latham, 4 East 28th Street, New York, New York upon the ground that said property was illegally seized without warrant, contrary to the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper."

The Government now seems especially disturbed by our reference to *Kremen v. United States*, 353 U. S. 346 (1957), since they make painfully strained attempts to distinguish the case (Their Brief, pp. 27, 52-55). The *Kremen* case is not a "new theory", as the Government apparently believes (Their Brief, p. 51); it is simply another legal authority for our position—unqualified from the outset—that the searches and seizures in this case violated the Fourth and Fifth Amendments. The case clearly should be considered as authority whenever, as in the case at bar, a general search and seizure have occurred.

The Government's reference to the stipulation by counsel in the District Court is irrelevant; the record clearly shows that counsel there were seeking, for the procedural convenience of the Court and at its request, to identify those specific items which were to be used by the Government as evidence (R. 87, 79).

To say that the failure to cite the *Kremen* case in the District Court "deprived the trial court of the opportunity of avoiding the alleged error by suppressing the evidence sought to be introduced" (Their Brief, p. 27) can only be advanced in a whimsical spirit, since the trial court's declared position before the hearing was concluded, was (R. 131):

"I think it is the job of the F. B. I. to bring to light information concerning violations of the law and I don't think it is part of the Court's duty to tell them how they should function."

Omissions.

The Court will note that despite the labored and repetitious arguments made in the Government's brief, they apparently have regarded it as prudent to ignore certain important materials contained in ours:

1. As the Government and the judiciary have consistently done in both courts below, the brief simply ignores our citation (Our Brief, p. 12) of the authoritative statement, vouched for by the Director of the F. B. I., that illegal searches and seizures are regularly being conducted by the Government in cases of suspected espionage;

2. They ignore Exhibit "C" to our Brief, which shows how extensive was the use of evidence seized at the Latham and evidence obtained from leads involved in the Latham seizures, and they seek to minimize this evidence in a manner which could mislead the Court; instead of the 7 items which, the Government continually implies, were the only ones used in this case, there actually were over 40 such items which were used (Our Brief, pp. 41-45).

Conclusion.

Rights granted to all by the Fourth and Fifth Amendments to the Constitution of the United States have been denied to the Petitioner in the case at bar.

The judgment below must be reversed, and the case remanded for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

JAMES B. DONOVAN,
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THOMAS M. DEBEVOISE, II,
Of Counsel.

Appendix.

8 CFR 242.10 *Representation by counsel.*

The respondent may be represented *at the hearing* by an attorney or other representative qualified under Part 292 of this chapter. (Italics supplied.)

Prior to amendment on January 6, 1956, 21 F. R. 97, effective February 6, 1956, the above regulation was contained in 8 CFR 242.14(b) which provided in pertinent part as follows:

Notice of right to counsel and release from custody. Upon service of the warrant of arrest, the alien shall be advised of *his right to representation by counsel*, at no expense to the Government, *at the hearing to be held* under the warrant of arrest. When taken into physical custody of the Service *he shall be informed* whether he is to be continued in custody or, if release from custody has been authorized, of the amount and conditions of bond or terms of conditional parole under which he may be released.
• • • (Italics supplied.)

SEP 2 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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September 21, 1959.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 263

RUDOLF IVANOVICH ABEL, also known as "Mark"
and also known as Martin Collins and Emil R. Goldfus,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT.*

SUPPLEMENTAL BRIEF OF PETITIONER.

On October 13, 1958 this Court granted our petition for a writ of certiorari, with respect to the following questions:

1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution of espionage?

On February 25, 1959 the case was orally argued. On March 23, 1959 the Court ordered re-argument and requested that counsel discuss in their further briefs, in addition to other issues, certain questions. These are set forth below, with the answers of petitioner thereto:

Question 1. "Whether under the laws and Constitution of the United States:

(a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued;

(b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody; and

(c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham?"

Answer 1. Under the laws and Constitution of the United States:

(a) the administrative warrant was not validly issued in that it fails to meet the requirements of the Fourth Amendment: the purpose stated in the warrant and the accompanying "Order to Show Cause and Notice of Hearing" (none "supported by Oath or affirmation") was to take petitioner into custody for a hearing before I. N. S. in New York City on July 1, 1957, with respect to whether petitioner as a suspected alien should be deported from the United States; actually the Department of Justice, pursuing a counter-espionage objective, used the administrative warrant as a subterfuge in order secretly to search, seize and conceal in Texas a suspected espionage agent and all his effects;

(b) such administrative warrant, so issued for such purposes, did not constitute a valid basis for arresting petitioner or taking him into custody; and

(c) such administrative warrant, so issued for such purposes, did not furnish a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

Question 2. "Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham were valid under the laws and Constitution of the United States?"

Answer 2. No.

Question 3. "Whether on the record before us the issues involved in Questions '1(a)', '1(b)' and '2' are properly before the Court?"

Answer 3. Yes.

Supplemental Fact.

Upon oral argument of the case, this Court evinced interest in whether (a) the I. N. S. on its own initiative and as a customary procedure, used an administrative warrant to seize Abel as an alien illegally in the United States, or (b) the I. N. S. so acted at the request of an F. B. I. interested in Abel's secret detention, for its own counter-intelligence purposes, prior to any public disclosure or indictment.

Counsel for petitioner pointed out that General Swing, the Director of I. N. S., publicly stated in a newspaper interview that "Abel would not have been arrested by immigration officials on June 21 if American counter-intelligence had not requested it" (76). This statement was never denied in the District Court by the Government, although it was given full opportunity to do so (75). Further, the truth of this assertion was borne out by the

testimony of all F. B. I. and I. N. S. officers who participated in the actual search and seizure (Our Principal Brief, pp. 5, 6).

The Government has weaved and ducked upon this question, hopefully relying on the Court of Appeals' characterization of General Swing's newspaper statement as "multiple hearsay" (852). It has been our position that the point is not of determinative importance, since our contentions are based on the course of action pursued by the Department of Justice, of which I. N. S. and the F. B. I. are component parts (Our Brief, pp. 9, 14, 15). However, it should be reported to the Court that any doubts in the matter have been conclusively resolved in favor of petitioner's contention.

In "Masters of Deceit, The Story of Communism in America and How to Fight It" (Henry Holt and Company, New York, 1958) the Abel case is discussed by J. Edgar Hoover, Director of the F. B. I., who makes the following statements of fact (pp. 298, 299):

"Such was the case of Colonel Rudolf Ivanovich Abel, of Soviet intelligence, who was arrested by the Immigration and Naturalization Service in June, 1957, at the request of the F. B. I., after we had identified him as a concealed agent. After his indictment in August, 1957, on espionage charges, information was made public concerning him which the F. B. I. could not previously disclose" (italics supplied).

This authoritative declaration by the Director of the F. B. I. surely will not be disputed by the Department of Justice. The prior public statement of the Director of I. N. S. thus has been corroborated by the highest possible source, in a manner of which the Court may take judicial notice.

POINT I.

Petitioner's Answers to the Court's questions for reargument, are supported in all respects by the Briefs and Arguments previously submitted to the Court.

In this case a simple precision—both in fact and in law—advances the contentions of petitioner, while confusion bred of verbosity can favor upholding Abel's conviction on emotional grounds which may be understandable but are quite irreconcilable with express provisions of the Constitution. For this reason among others, we shall not reiterate at length the arguments previously set before the court.

A.

Our answer to the Court's first question, concerning the validity of the administrative process employed in this case, is supported by the full text of our Principal Brief. The procedural devices employed by the Government to seize and subsequently convict petitioner are repugnant to the letter and the spirit of the Constitution, as well as our heritage of freedom.

B.

Our answer to the Court's second question, concerning the validity of the Government's acts if such had been undertaken without any pretense of process, is also supported by our Principal Brief. The Court's attention is directed to Appendix B therein (pp. 38-40), entitled "Evidence of Espionage Obtained by the Department of Justice Prior to Abel's Detention for Deportation on June 21, 1957." In view of the Government's prior possession of such a plethora of evidence, there can be no justification of its failure to conform to the express requirements of the

Fourth Amendment and due process of law. Our Principal Brief, pp. 18-25; Notes 34 N. Y. U. Law Review 159 and 34 N. Y. U. Law Review 619 (1959). See also the reasoning in all opinions in *Baltimore Health Inspectors Case*, 359 U. S. 360 (1959).

C.

Our answer to the Court's third question, as to whether certain of the "search and seizure" issues are properly before the Court, is supported by the Transcript of Record, our Petition for Certiorari and our briefs and oral argument in this Court.

If any aspect of the "search and seizure" problem in this case is not before the Court, it would be difficult for counsel to understand how else it could have been accomplished. The issues were not presented first to the trial court upon the cursory argument of the admissibility of an item of evidence; they were not even first presented by an ordinary pre-trial motion under Rule 41-E for the suppression of evidence (281). Because of a decision by the Court of Appeals for the Second Circuit [*U. S. v. Klapholz*, 230 F. 2d 494 (1956)] indicating such to be the correct procedure, counsel for petitioner first asserted these contentions in an independent civil proceeding for the return of property, brought in the District wherein it was seized. The attention of the Court is respectfully directed to the factual and legal arguments supporting and opposing that original proceeding in the Southern District of New York (20-78). They are virtually identical in substance with the arguments now made by both counsel before this Court. Following this procedure, upon a pre-trial motion under Rule 41-E a lengthy pre-trial hearing with examination and cross-examination of witnesses was held in the Eastern District of New York (79-282). Written opinions on the subject were delivered by the District Court (239-246) and

the Circuit Court (848-856). The issues were explicitly set forth in the Petition for Certiorari pages 4-7, 10, 13-16, Appendix "D").

Any complaint by the Government of these issues being newly introduced, can only be understood as a reluctance to face them. In the District Court the Circuit Court and in this Court upon our Petition for Certiorari, the "search and seizure" question was one of various legal points advanced by the defense. It was not until this Court granted our petition upon the single ground of "search and seizure" that all efforts of counsel (and space in briefs) were devoted to an exhaustive presentation of every argument and precedent which could aid the Court in a proper determination. Oral argument and the questioning of the Court further probed the issues.

The more complete examination in an appellate court, of the legal issues raised below and their implications, does not affect whether these issues are properly before the Court. The Court should ignore any such whimpers by the Government in this case unless it can be shown that any question now asked by the Court in its Order for Reargument, is not germane to a proper determination of the issues raised in a pre-trial proceeding which set forth the pertinent facts and asked the District Court to grant an order (21):

"Directing the Respondent, United States of America, to return and to suppress for use as evidence any and all property seized on the 21st day of June, 1957 in Room 839, Hotel Latham, 4 East 28th Street, New York, New York upon the ground that said property was illegally seized without warrant, contrary to the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and for such other and further relief as to the Court may seem just and proper."

Conclusion.

The judgment below must be reversed, and the case remanded for further proceedings not inconsistent with the decision of this Court.

Respectfully submitted,

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No. 2

In the Supreme Court of the United States

OCTOBER TERM, 1959

**RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK"
AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R.
GOLDFUS, PETITIONER**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

**SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON
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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 2

RUDOLF IVANOVICH ABEL, ALSO KNOWN AS "MARK"
AND ALSO KNOWN AS MARTIN COLLINS AND EMIL R.
GOLDFUS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

This supplemental brief for the United States is filed pursuant to the order of this Court dated March 23, 1959 (359 U.S. 940; R. 867), setting the case down for reargument and directing that counsel discuss the following questions in their further briefs and oral arguments:

1. Whether under the laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody,

and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham, were valid under the laws and Constitution of the United States.

3. Whether on the record before us the issues involved in Questions "1(a)," "1(b)," and "2" are properly before the Court.

In our prior brief (1958 Brief, p. 2) and argument we were limited by the Court's order granting certiorari (358 U.S. 813; R. 866; *infra*, p. 4) to consideration of the validity of the search and seizure which produced certain evidence used at the trial. Since no issue had ever been raised concerning the validity of the petitioner's arrest as such, we assumed that the arrest was (as it was conceded to be), valid, and confined our argument to the legality of a search incident to an Immigration Service arrest. Now the questions posed by the Court's reargument order raise specifically the issue of the validity of the arrest. In this brief we shall discuss that issue, but will not repeat our argument with respect to the propriety of a search incident to an immigration arrest, as to which we rely on our 1958 Brief.

STATEMENT

The petitioner was charged (R. 7-19) in an indictment returned on August 7, 1957, in the United States District Court for the Eastern District of New York with having conspired with others, from about 1948 to the date of the indictment, (1) to communicate and transmit to the Union of Soviet Socialist Republics information relating to the national defense of the United States in violation of 18 U.S.C. 794(a), (2) to obtain documents and other materials connected with the national defense of the United States for the purpose of transmitting such documents to the U.S.S.R. in violation of 18 U.S.C. 793, and (3) to act in the United States as an agent of the U.S.S.R. without prior notification to the Secretary of State in violation of 18 U.S.C. 371 and 18 U.S.C. 951. Prior to trial, the petitioner moved to suppress as evidence certain items which he alleged were illegally seized at the time and place of his arrest (R. 239). Affidavits were filed in support and in opposition to the motion (R. 22-78), and a hearing was held (R. 4, 79-238). The motion was denied (155 F. Supp 8; R 239-246).

At the trial, the government offered in evidence seven of the items seized in the petitioner's hotel room

¹ This Statement describes the evidence relating to the validity of the petitioner's arrest. A more complete Statement detailing the circumstances surrounding the search was included in the government's 1958 Brief, pp. 3-23.

at the time of his arrest or shortly thereafter (Exs. 77-81, 87, 88; R. 661-671, 693-695, 724, 726). Subsequently, the petitioner was convicted by a jury on all three counts of the indictment and was sentenced on November 15, 1957, to serve a total of thirty years' imprisonment and to pay a \$3,000 fine (R. 5-6). On appeal to the Court of Appeals for the Second Circuit, the petitioner's conviction was affirmed (258 F. 2d 485; R. 837-865).

The petitioner filed a petition for certiorari on August 8, 1958. On October 13, 1958, this Court granted certiorari (358 U.S. 813; R. 866) "limited to questions 1 and 2 presented by the petition for the writ which read as follows:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immigration Service warrant, but has not been arrested for the commission of a crime?

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

After argument, the Court, on March 23, 1959, ordered reargument and requested counsel to discuss certain

questions concerning the validity of the petitioner's arrest, 359 U.S. 940, see *supra*, pp. 1-2.

The pertinent facts are as follows:

A. BACKGROUND OF THE PETITIONER'S ARREST

Information concerning the petitioner's espionage activities in the United States was given the F.B.I. in May, 1957, by one Reino Hayhanen, a defected Soviet agent (R. 437-444). Investigation by the government corroborated many details of Hayhanen's statements (R. 513-537, 582-588, 599-600, 654-657), and, based on this information, the F.B.I. conducted an intensive investigation of the petitioner and his activities (R. 56-57).

The Immigration and Naturalization Service (I.N.S.) was first apprised of the information concerning the petitioner on or about June 13, 1957. On that date, Sam Papich, the F.B.I. liaison officer with the I.N.S. (R. 159, 198-199), informed Mario T. Noto, the Deputy Assistant Commissioner for Special Investigations of the I.N.S. in Washington, D.C. (R. 91, 198), that the F.B.I. had information concerning an alien then in the United States who had illegally entered the country from Canada and who was "using fraudulent documents in the United States which professed him to be a citizen, whereas in fact he was an alien" (R. 199). Papich also told Noto that the F.B.I. had considerable information that the suspect was engaged in espionage (R. 199-200). According to Noto's recollection, Papich, during this conversation,

had referred to the petitioner under several names, including Abel, Goldfus, and Collins (R. 200-201). Immediately following the conversation, Noto had a search of I.N.S. records made for any available information pertaining to an individual known by any of these names (R. 201-202, 214).

Sometime between June 18 and 20, 1957, Noto received from Papich additional information concerning the case, including the full names or aliases used by the suspect, that the suspect had used a birth record under an assumed name, that he had entered the United States from Canada, that he had admitted to various persons that he was in the United States illegally, that he held a rank in the Soviet espionage apparatus, and that he had engaged in espionage activities in this country (R. 203-204).

On June 19 or 20, 1957, Noto told the F.B.I. agents that "I had determined that I had enough evidence upon which I was going to order that Mr. Abel would be arrested" for the deportable offense of "having failed to notify the Attorney General of his address in the United States as required by the Immigration and Nationality Act" and that "I would determine very shortly as to whether or not I would order that Mr. Abel be apprehended for immigration purposes" (R. 207; see R. 208, 210).

Late in the afternoon of June 20, 1957, Robert Schoenenberger and Lennox Kanzler, two other I.N.S. officers (R. 91-92, 157-158), were briefed about the case by Papich and other F.B.I. agents (R. 91-92, 158-159, 160-161) and were given an F.B.I. report describing this "person who had entered the United

States illegally in 1949 from Canada at an unknown port" (R. 125, 131-132, 161, 213). The report stated that a "confidential informant who is a defected Soviet intelligence agent" had told the F.B.I. that a man known to him as "Mark" had been in Soviet espionage work since 1927, was presently, "a colonel in the Soviet State Security Service," had been operating as an espionage agent in the United States since 1949 when he entered from Canada, and "has never obtained any documents which would tend to legalize his status in the United States." The report further said that an F.B.I. investigation disclosed that "Mark" was operating in the United States under the names of Emil R. Goldfus and Martin Collins. After reviewing all their information, Noto, Schoenenberger, and Kanzler concluded that they had sufficient evidence to draw up in the name of "Martin Collins" an order to show cause why the recipient should not be deported, and also a warrant of arrest for deportation (R. 33-37, 106-107, 115). Accordingly, Kanzler, pursuant to Noto's orders, prepared these documents (R. 163).

About 3:00 p.m. the same day, Schoenenberger was instructed to go to New York to confer with John Murff, the Acting District Director of the I.N.S., and "to convey to him all of the information which we had [concerning the petitioner] which could not be communicated on the telephone" for the purpose of

² This report was originally classified as secret and was placed under seal by the trial court at the time it was made a part of the record in the case during the pretrial hearing (R. 237-238). As the report has since been declassified by the F.B.I., copies have been lodged with the Court and sent to the petitioner's counsel.

asking him to sign an order to show cause addressed to the petitioner under the name of Collins and a warrant for his arrest (R. 91-92, 211, 213).

Schoenenberger and Kanzler, with two other I.N.S. investigators, Farley and Boyle, conferred with Murff. Schoenenberger produced the F.B.I. report (R. 125, 131-132) and "furnished [Murff] the information that had been furnished by the Federal Bureau of Investigation" (R. 95). After considering this information, Murff "concluded that an order to show cause and a warrant of arrest should be issued and served on the [petitioner]" (R. 95; see R. 108). Murff accordingly signed these documents at approximately midnight on June 20 (R. 96, 108). Schoenenberger, at the request of the F.B.I., agreed to give the latter an opportunity to interview the petitioner before his arrest to ascertain whether he would "cooperate" (R. 97, 98-99, 140).

B. THE PETITIONER'S ARREST

F.B.I. agents knocked on the petitioner's door at approximately 7:02 a.m. the next morning, June 21, 1957. The petitioner answered "Just a minute" or "Just a moment", and then opened the door. The agents walked in, identified themselves, and proceeded to question him for approximately half an hour (R. 175-185, 241-242). At the completion of this interview, I.N.S. officers Farley and Boyle were informed that they could enter to effect the petitioner's arrest (R. 137-140, 189-190, 242). They entered the room, which was a small single hotel room, approximately twelve feet by eight feet in size with an adjoining bath (R. 140); at approximately 7:25 a.m. (R. 189-190).

Boyle, after establishing the identity of the person in the room as being Martin Collins, served him with the immigration warrant of arrest (R. 33, 54, 67, 189). He read to the petitioner a portion of the order to show cause and asked him to sign it—which the petitioner did (R. 53-54, 67-68, 140-141, 189-190). The petitioner was also advised by Boyle that he had a right to counsel (R. 189). At approximately 7:30 a.m., Farley and Boyle were joined by Schoenenberger and Kanzler (R. 65, 68, 101, 142, 165, 662), who entered the room to supervise the taking of the petitioner into custody and the examination of "his personal effects in an effort to locate documentary evidence of alienage" (R. 65, 102).

SUMMARY OF ARGUMENT

I

(a) Although the Court has asked counsel to discuss the legality of the petitioner's arrest, the Court has also raised the question of whether that issue is properly before the Court. We urge that it is not. Although constitutional considerations are involved, the specific problem before the Court is the admissibility of seven exhibits. The petitioner not only failed to object to their use on the basis of the illegality of the arrest; at the hearing on the motion to suppress, his counsel specifically disclaimed any attack on the arrest. If the point had been raised at that time, the government could have attempted to meet the issue and, if unsuccessful, the evidence would have been excluded. But the case could have continued without this evidence. For the petitioner to

wait until now is, in effect, to invite error (by failing to challenge the arrest in the trial court) and then seek a new trial on the basis of that "error" when all else fails. This is not permissible.

(b) Under the Immigration and Nationality Act of 1952 and the regulations thereunder, deportation proceedings are now commenced by orders to show cause issued by district directors on applications by agents who must have a prima facie case of deportability. Arrests pending deportation on warrants of the district directors are effected only when it is necessary to prevent an alien from absconding or to prevent him from illegal activity. Cf. *Carlson v. Landon*, 342 U.S. 524. The warrant in this case complied with the procedure provided under the statute. The F.B.I. had checked on information concerning the petitioner given it by a defecting Soviet agent and had uncovered sufficient corroborating evidence to justify bringing the case to the attention of the Immigration Service. The latter's check showed that petitioner had not reported his address, as was required by law, and was therefore prima facie deportable. These facts, supported by the F.B.I. report, were laid before the District Director in New York. His action in issuing the arrest warrant was fully justified under these circumstances.

(c) The requirements of the Fourth Amendment that warrants be issued on the basis of probable cause, supported by oath or affirmation, are inapplicable to deportation proceedings. At the last term, this Court reviewed the history of the Amendment in *Frank v.*

Maryland, 359 U.S. 360, and determined that Fourth Amendment warrants are required only in criminal proceedings. Deportation is not criminal in nature and this Court has consistently refused to engraft the restrictions of criminal procedure on its processes. Equally, Congress has from the beginning authorized immigration arrests without Fourth Amendment warrants, and the statutory procedure has been assumed to be valid in many deportation cases reviewed by this Court. Whenever attacked in the lower courts, such warrants have been upheld.

(d) In any event, the arrest here would not be illegal under the Fourth Amendment by reason of the lack of formality in the issuance of the warrant since it is well established that, even in the absence of any warrant at all, an arresting officer may take a person into custody if he has probable cause to believe that he is guilty of a crime.. *Draper v. United States*, 358 U.S. 307. Here, the very facts which constituted the prima facie case brought to the attention of the District Director were in the possession of the arresting officers and went beyond what is necessary to constitute probable cause. Therefore, as in criminal cases, the arrest was fully justified on the basis of probable cause to believe that the petitioner was deportable. The only question as to the justification possessed by the arresting officials which the petitioner raises is that the arrest was a subterfuge to take the petitioner into custody for the F.B.I., and its purposes. But the specific findings of the trial court, affirmed by the court below, dispose of that issue.

(c) As to whether the arrest violated due process, the arguments that sustain the arrest on the basis of probable cause likewise sustain it against a claim of lack of due process. Certainly, due process does not turn solely on the presence or absence of an oath. The regular immigration procedures were followed and they appear appropriate and fair in view of the nature of the proceedings involved.

II

The Court has also invited counsel to consider the legality of the arrest independently of the warrant. In that connection, we urge that the arrest was legal on the ground that a misdemeanor was in the process of commission in the very presence of the arresting officers, justifying them in making the arrest wholly apart from their authority in connection with the deportation proceeding. It is entirely appropriate that this contention as to the arrest be presented at this stage of the case for the first time since the issue of the legality of the arrest was not raised earlier. This is therefore the first opportunity the government has had to present the argument. Moreover, it does not depend on facts which could have been better presented or refuted below.

The petitioner's misdemeanor consisted of violating 8 U.S.C. 1306(b), which imposes a criminal penalty for the failure of an alien to report his address to the Attorney General. Such a violation is a continuing

offense. Cf. *United States v. Cores*, 356 U.S. 405. Since the offense was occurring in their presence, the arresting officers had authority to take the offender into custody. Where there are several possible and reasonable grounds for making the arrest the legality of the arrest should not depend upon whether or not the arresting officer happens to choose a particular valid ground. Cf. *United States v. Rabinowitz*, 339 U.S. 56, 60.

ARGUMENT

In dealing with the questions listed in the Court's order of March 23, 1959 (*supra*, pp. 1-2), we shall discuss in Point I, the question of the validity of the Immigration Service arrest warrant, including in that discussion the portion of Question 3 which deals with whether the validity of the arrest is properly before this Court. In Point II, we shall answer the question on the validity of the arrest independent of the warrant, including under this point the answer to that portion of Question 3 which deals with whether that question is properly before the Court. As noted above, we shall not repeat our prior argument relating to the search and seizure as incidents of the arrest.

THE INTRODUCTION OF THE EVIDENCE SEIZED DURING THE SEARCH OF THE PETITIONER'S ROOM SHOULD NOT BE HELD TO BE ERROR ON THE GROUND THAT THE IMMIGRATION WARRANT WAS INVALID AND THEREFORE DID NOT CONSTITUTE A VALID BASIS FOR THE ARREST

A: THE PETITIONER'S DISCLAIMER BEFORE THE TRIAL, AND LATER, OF ANY ATTACK ON THE VALIDITY OF THE ARREST PRECLUDES THE COURT FROM UPHOLDING ANY OBJECTION TO THE EVIDENCE ON THAT GROUND NOW

Although the questions asked by the Court involve basic issues of constitutional law, it is important to note the setting in which these questions arise. Specifically in issue is the question of whether or not seven items of evidence should have been admitted over the petitioner's objection.³ If the issue as to the

³ The seven items were (1) a fictitious birth certificate in the name of "Martin Collins" (Ex. 78); (2) a spurious birth certificate in the name of "Emil Goldfus" (Ex. 79); (3) an International Certificate of Vaccination dated May 23, 1957, in the name of Martin Collins (Ex. 80); (4) an East River Savings Bank bank book in the name of E. R. Goldfus (Ex. 81); (5) a strip of graph paper containing a coded message (Ex. 77); (6) a piece of wood, wrapped in sandpaper, containing a cipher pad (Ex. 88); and (7) a hollowed-out wooden pencil containing microfilm (Ex. 87).

The overwhelming nature of the remainder of the government's evidence supports the conclusion that only three of the items seized during this search were prejudicial to the petitioner. Admittedly, the graph paper containing a coded message (Ex. 77; R. 38, 49, 665-666), the hollowed-out piece of wood containing a cipher pad (Ex. 88; R. 693-695), and the hollowed-out pencil containing microfilm with a radio receiving schedule in Russian (Ex. 87, 98) are so obviously related to the equipment of an espionage agent that their effect was likely to be prejudicial. But, if we assume that the petitioner's arrest was legal and that I.N.S. officers have any authority to search

validity of the arrest had been raised at or before the trial, the government would have been in a position to make an additional showing of facts to support the validity of the arrest (see *United States v. DiRe*, 332 U.S. 581, 588; *Giordenello v. United States*,

incident to a valid I.N.S. arrest, then it seems clear that the seizure of these three items was legal. The graph paper was seized on the petitioner's person as he was trying to conceal it in his sleeve (see the argument in our 1958 Brief, pp. 57-58), and the hollowed-out wood and pencil were found in the wastebasket after the petitioner had voluntarily abandoned the room (see our 1958 Brief, pp. 58-60). The other four items were clearly cumulative. First, the F.B.I. report given to the I.N.S. before the arrest shows that the F.B.I. knew that the petitioner was using the names of Collins and Goldfus even before his arrest (*supra*, p. 7). Second, considerable other evidence was introduced by the government at the trial showing that the petitioner was using these names, including a lease and letter signed by the petitioner as Goldfus (Exs. 50, 51; R. 544-546); rental records pertaining to the petitioner's rooms at 252 Fulton Street in the name of Goldfus (Ex. 49; R. 542-543); testimony by the superintendent and two other tenants at 252 Fulton Street that they knew the petitioner as Goldfus (R. 548, 561-563, 707); two signature cards of the National City Bank in the name of Goldfus, together with two letters of recommendations referring to the petitioner as Goldfus (Ex. 71; R. 630-631); a subsequent signature card of the National City Bank, together with a ledger sheet in the name of Goldfus (Ex. 72; R. 631-634); a signature card showing that the petitioner registered at the Benjamin Franklin Hotel as Goldfus (Ex. 73; R. 634); records of the Hotel Latham showing that the petitioner occupied room 839 in the name of Collins (Ex. 76; R. 658); the testimony of the manager of the Hotel Latham that the petitioner registered as Collins (R. 657-658); and, most important, a transcript of the I.N.S. deportation hearing at which the petitioner admitted that he had been using the names of Goldfus and Collins (R. 690).

Even if the later search of room 509 at 252 Fulton Street was dependent on the arrest, search and seizure in the Hotel Latham (despite the government's argument to the contrary

357 U.S. 480, 487-488), and, if the factual and constitutional issues had been decided adversely to it, the seven items of evidence would have been excluded. The government could then have proceeded with the evidence it still had, which on the record appears to have been overwhelming, or it could have attempted to supplement the record to replace the excluded items with other legally admissible evidence. We urge that in considering whether the issue of the vali-

(see our 1958 Brief, p. 60, n. 24)), it is clear that the search of room 509 was not based on the seizure of the four documents mentioned above. The affidavit of application for the search warrant for room 509 mentioned the petitioner's arrest, the pencil taken from the wastebasket, and the supervening indictment of the petitioner charging him with conspiracy to commit espionage by secreting microfilm in hollowed-out objects (R. 264-265)—none of which relates to the four documents.

Thus, if the Court should uphold the petitioner's arrest, and the seizure of the items taken from the hotel room with the exception of the four documents, it may fairly be said that the illegal seizure involved only cumulative evidence. In *Segura v. United States*, 275 U.S. 106, 111, this Court stated: "As there was no evidence introduced by the defendants to refute or deny the testimony unobjected to, which clearly showed the illegal transportation of the liquor [which the petitioner alleged had been obtained by an illegal search] and sustained the verdict, the admission in evidence of the liquor * * * worked no prejudice for which a reversal can be granted." Under similar circumstances the Sixth Circuit upheld a conviction, even though the challenged evidence was in fact illegally seized, on the ground that cumulative evidence is not prejudicial. *Laughter v. United States*, 259 Fed. 94, 100, certiorari denied, 249 U.S. 613. See also *Agnello v. United States*, 269 U.S. 20, where the Court, in reversing the conviction, first answered the government's contention that the disputed evidence was not prejudicial (*id.* at 26-27), by finding that the evidence was in fact prejudicial (*id.* at 35, 36); *Weeks v. United States*, 232 U.S. 383, 398, where the Court reversed because "prejudicial error was committed."

dity of the arrest is still open for consideration the Court must weigh the prejudice to the government resulting from the fact that the issue was not raised at a time when the effect of sustaining it, if it is sustainable, would have been relatively minor; if the error is to be corrected now, the judgment will have to be reversed after the jury has convicted and the court below affirmed. To be sure, some errors are so vital to a proceeding and so pervasive of the entire trial, such as for example the absence of counsel or the use of a confession illegally obtained, that it is never too late to notice them and correct the injustice. Cf. *Gambino v. United States*, 275 U.S. 310, 319; *Johnson v. Zerbst*, 304 U.S. 458; *Screws v. United States*, 325 U.S. 91, 107. Such is clearly not the case here for, although we make no formal argument of "harmless error," the items of evidence involved were clearly but a small part of the government's entire case.

The record in this case indisputably demonstrates that the petitioner has not, in any previous stage of these proceedings, challenged the validity of the warrant of arrest issued by the Immigration and Naturalization Service to authorize his detention pending determination of his deportability. In an affidavit filed in support of the motion to suppress in the district court, the petitioner's chief counsel succinctly stated the basis of his request for a hearing on the motion (R. 72):

The defendant maintains that the true objective of the Department of Justice in conducting the search and seizure at the Hotel Latham

on June 21, 1957, was to obtain any espionage material possessed by a suspected Soviet agent in Room 839;

The Government, in the affidavits most recently submitted in its behalf, apparently denies this contention.

Subsequently, the petitioner, at the hearing on his motion to suppress, relied exclusively on the illegality of the search and seizure themselves and made no claim that the search and seizure were invalid on any theory of the invalidity of his arrest (see, *e.g.*, R. 116-117, 125, 126-127, 129-130, 152, 154, 171, 227). Thus, Judge Byers, in his opinion denying the petitioner's motion, paraphrased the petitioner's contentions as follows (R. 242-243):

(1) The search incidental to his arrest was illegal since a deportation proceeding is not criminal in nature.

(2) If the foregoing is decided against him, that the search should be deemed to be illegal and not made in good faith, for the reason that the Department of Justice used the deportation procedure and the incidental arrest in bad faith; that the ultimate purpose was to secure evidence as the result of a search which could be used in a prosecution for the alleged violation of our espionage laws, although at the time that the arrest and search took place, the Department was not in a legal position to institute a criminal prosecution based upon the alleged violation of the espionage statutes.

In fact, not only did the petitioner fail to urge illegality of the arrest as a ground for his motion to

suppress, but, in arguing the motion, it was specifically conceded that the arrest was legal (R. 126-128):

The Court: They were not at liberty to arrest him?

Mr. Fraiman [petitioner's counsel]: No, Your Honor. They were perfectly proper in arresting him. We don't contend that at all. As a matter of fact, we contend *it was their duty to arrest this man as they did*. I think * * * it showed admirable thinking on the part of the F.B.I. and the Immigration Service. We don't find any fault with that.

Our contention is that although they were permitted to arrest this man, and in fact, *had a duty to arrest this man in a manner in which they did*, they did not have a right to search his premises for the material which related to espionage.

* * * * *

The Court: He was properly arrested.

Mr. Fraiman: *He was properly arrested, we concede that*, your Honor. [Emphasis added.]⁴

Similarly, the petitioner did not challenge the validity of the warrant or otherwise urge the illegality of his arrest in the court of appeals. See Brief for Appel-

⁴ Earlier, the following colloquy had occurred between counsel and the court (R. 116-117):

The Court: You contend that there was no sufficient cause for the Immigration Department to cause this arrest?

Mr. Fraiman: Your honor, I can't make that contention.

The Court: Of course you can't.

Mr. Fraiman: Until I ask—

The Court: Obviously that is not so. This is not your position, is it?

Mr. Fraiman: Not at this time.

lant, C.A. 2, No. 24968: Under these circumstances, both the trial court and the court below assumed the validity of his arrest and did not consider or decide whether the Fourth Amendment is applicable to immigration arrest warrants or, if the Fourth Amendment does apply whether the petitioner's arrest was nevertheless valid on the basis of probable cause. See 155 F. Supp. 8; 258 F. 2d 485.⁵

This Court specifically stated in *United States v. Atkinson*, 297 U.S. 157, 159:

The verdict of a jury will not ordinarily be set aside for error not brought to the attention of the trial court. This practice is founded upon considerations of fairness to the court and to the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. * * *

See also, *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 239; *Johnson v. United States*, 318 U.S. 189, 200; *Az Din v. United States*, 232 F. 2d 283 (C.A. 9), certiorari denied, 352 U.S. 827; *United States v. De Marie*, 226 F. 2d 783 (C.A. 7), certiorari

⁵ The fact that the petitioner did not intend to challenge the validity of the arrest below is further confirmed by the petitioner's position in this Court. The petition for certiorari did not contest the legality of the warrant and, although the government dealt with the issue in its original brief on the merits (pp. 30-33), the petitioner's reply brief unequivocally denied that he was questioning the validity of the arrest (Pet. Reply Br. 3). We do not refer to this position of the petitioner in his reply brief in order to bind the Court to his position here (since the issue has been specifically raised by the Court's own order for reargument), but because it confirms our assertion that the petitioner did not intend to, and did not, raise that issue below.

denied, 350 U.S. 966; *Wheeler v. United States*, 165 F. 2d 225 (C.A.D.C.), certiorari denied, 333 U.S. 829.⁶ These principles are equally applicable where an objection, though raised at the proper time in the trial court, did not include the specific ground relied upon on appeal. See 1 Wigmore, *Evidence* (3d ed., 1940), § 18; e.g., *Litton v. United States*, 177 F. 2d 416 (C.A. 8). Therefore, even if the question of the good faith of the arrest was impliedly included in the petitioner's challenge to the good faith of the search and seizure (despite his counsel's explicit statements to the contrary, *supra*, pp. 19, n. 4, 20, n. 5), the general validity of an I.N.S. arrest warrant under the Fourth Amendment is a distinct issue and was not raised.

The government recognizes, of course, that the

⁶ See also *United States v. Jones*, 204 F. 2d 745 (C.A. 7), certiorari denied, 346 U.S. 854, involving a situation similar to that involved here. In that case a warrant had been issued for the defendant's arrest and, subsequently, a search warrant was procured to search his living quarters. Two federal narcotic officers, who were not in possession of the warrant of arrest, proceeded to the building described in the search warrant and, upon observing the defendant emerging from his apartment, arrested him and searched his person, finding a quantity of heroin. Prior to trial, the defendant moved to suppress as evidence all articles taken from his person on the basis of four specified grounds. On appeal, he urged as an additional ground for the illegality of the search and seizure that the federal narcotic officers had no authority to make the arrest since they could not execute a warrant of arrest. The court of appeals, however, refused to "give defendant two bites at the same cherry, by declaring erroneous action of the trial court, the fault of which defendant did not see fit to make the court aware, when he had the opportunity to do so." *Id.* at 749. Accord, *Rodriguez v. United States*, 80 F. 2d 646, 647-648 (C.A. 5).

Court has the power to notice "[p]lain errors or defects affecting substantial rights" although they were not called to the attention of the trial court or even this Court. Rule 52(b), F.R. Crim. P.; Rule 40(1)(d)(2) of the Rules of this Court; see *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 411-412; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 16; *Wccms v. United States*, 217 U.S. 349, 362. This power, however, is exercised "only in clear cases and in exceptional circumstances," *Kessler v. Strecker*, 307 U.S. 22, 34, where "the errors are obvious, or * * * seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, *supra*, 297 U.S. at 160. No such circumstances are present here.—In view of the long-standing congressional policy of authorizing executive officers to issue warrants for the arrest and detention of aliens pending a determination of deportability and the fact that for years this practice has received the tacit approval of this and other federal courts (see *infra*, pp. 33-36), the alleged invalidity of such warrants certainly cannot be considered obvious. Moreover, in this case, there was overwhelming evidence of guilt of the conspiracy charged in the indictment, apart from the few items offered in evidence by the government which were obtained as a result of the challenged search. This is not a case, therefore, where, if the alleged error in permitting these items to be introduced is left unnoticed, the fairness, integrity, or public reputation of judicial proceedings would be seriously affected.

As we have already suggested, it is clear from the entire record that the exclusion of all the allegedly

tainted evidence would not have substantially harmed the government's case. In these circumstances, where consideration of the evidence by the jury will not significantly increase the chances of conviction, it is obviously to a defendant's advantage, if he can raise the issue later, to hold back an objection until appeal at a time when it is too late for the prosecution to cure the defect (which it might easily have done if the matter had been raised in the trial court). In this way, he does not substantially lessen his chances of an acquittal in the trial court, and, if the verdict goes against him, he has an additional ground for reversal on appeal. No doubt in the instant case the petitioner did not challenge the validity of his arrest because his counsel believed that the arrest was in fact valid and not because he deliberately desired to retain issues for purposes of appeal. Nevertheless, the motive of trial counsel is a subjective matter which is frequently impossible to ascertain, and as a matter of principle this Court cannot attempt to distinguish between the cases where it will let the objection be raised late, and those where it will not, on the basis of the good or bad faith of counsel. The effect on the trial is the same in either event.

B. THE IMMIGRATION ARREST WARRANT CONSTITUTED A VALID BASIS FOR ARREST UNDER THE LAWS AND THE CONSTITUTION

1. *The warrant complied with applicable law*

(a) Section 242(a) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252(a)) provides that an alien "may, upon warrant of the Attorney General, be arrested and taken into custody" pending a deter-

mination of deportability.⁷ This is the direct successor of Section 20 of the Immigration Act of 1917, as amended by the Internal Security Act of 1950 (64 Stat. 1010), which was involved in *Carlson v. Landon*, 342 U.S. 524; where this Court upheld the detention of a deportable alien arrested by the Immigration Service pursuant to a warrant under that section.

Since 1956, deportation proceedings have been regularly commenced by orders to show cause issued by the district directors pursuant to applications which, by formal instruction, may be made only when the I.N.S. agent applying for the order has a *prima facie* case of deportability (8 C.F.R. 242.1; Immigration and Naturalization Service Operations Instructions, Part 242-1, Appendix, *infra*, pp. 52-53). Rule 242.2 (a) (8 C.F.R. 242.2(a)) of the Rules under the Act provides:

At the commencement of any proceeding under this part, or at any time thereafter and up to the time the respondent becomes subject to supervision under the authority contained in section 242(d) of the act, the respondent may be arrested and taken into custody under the authority of a warrant of arrest issued by a dis-

⁷ Authority to delegate the powers vested in the Attorney General by the Act is granted by Section 103(a) of the Act (8 U.S.C. 1103(a)) and it was contemplated that general responsibility would be placed in the Commissioner of Immigration and Naturalization (8 U.S.C. 1103(b)). The legality of such delegation has been upheld. *Cabrera v. Savoretti*, 252 F. 2d 294 (C.A. 5); *Wolf v. Boyd*, 238 F. 2d 249 (C.A. 9), certiorari denied, 353 U.S. 936; *United States v. Vician*, 224 F. 2d 53 (C.A. 7).

strict director whenever, in his discretion, it appears that the arrest of the respondent is necessary or desirable. * * *

It is clearly the provisions of the Immigration and Nationality Act and these regulations which govern in this case rather than the provisions for warrants in criminal cases provided by 18 U.S.C. 3041 and Rules 3 and 4 of the Federal Rules of Criminal Procedure. Deportation proceedings, as this Court has repeatedly recognized, are civil in nature and not criminal proceedings. *Fong Yue Ting v. United States*, 149 U.S. 698, 730; *Bilokumsky v. Tod*, 263 U.S. 149; *Carlson v. Landon*, *supra*, 342 U.S. 524; *Harisiades v. Shaughnessy*, 342 U.S. 580.⁹

Taken together, the regulations and Operations Instructions establish the following procedure: the deportation proceeding is commenced by the issuance of an order to show cause based on evidence establish-

⁹ Warrants for arrest are now applied for only in the few cases where there is danger that the alien will abscond or where his detention is necessary to promote the national security. See Gordon and Rosenfield, *Immigration Law and Procedure* (1959), §§ 5.3a, 5.4a.

"A single district court, while recognizing the civil nature of deportation proceedings, has said that the Federal Rules of Criminal Procedure "as to the manner of executing a warrant and making a return thereon state a proposition general in its application." The court, nonetheless, held that the warrant of arrest in that case, which had been issued by I.N.S. officers "conforms to Rule 4(b)" despite the fact that Rule 4(b) explicitly requires that a warrant be signed by a Commissioner. *Ex Parte Sentner*, 94 F. Supp. 77, 79 (E.D. Mo.). Thus, the district court apparently intended to hold that the Rules are applicable as a guide to determining proper procedure in deportation cases in the absence of specific provisions to the contrary in other statutes and regulations.

ing a prima facie case. The alien, however, is not arrested unless, in addition to the determination that there is a prima facie case, the district director decides that his arrest is necessary or desirable.

(b) This Court has defined prima facie evidence as such evidence as "in judgment of law, is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose." *Kelly v. Jackson*, 6 Pet. 622, 632 (see also *infra*, pp. 43-44). The evidence presented to Acting District Director Murff amply provided prima facie evidence that the petitioner was an alien who had failed to notify the Attorney General of his address as required by Section 265 of the Immigration and Nationality Act (8 U.S.C. 1305) and was therefore deportable under Section 241 (8 U.S.C. 1251(a)(5)).

The record shows that Reino Hayhanen had described to the F.B.I. the petitioner's espionage activities in the United States prior to the petitioner's arrest (see R. 56-57). Hayhanen's account had been checked by the F.B.I. and in numerous respects was confirmed (*supra*, p. 5). Thus, the F.B.I. could reasonably consider Hayhanen as a reliable informant. He gave to the F.B.I. information that the petitioner was an alien who was purporting to be an American citizen (R. 199).¹⁰ Moreover, Hayhanen told the F.B.I. that the petitioner "has never obtained any

¹⁰ Although the record does not state that it was Hayhanen who gave the F.B.I. this information, he must have been at least the original source. The F.B.I. report, later given to the I.N.S. officials, states that Hayhanen informed the F.B.I. that the petitioner was a long-time Soviet espionage agent (*supra*, p. 7).

documents which would tend to legalize his status in the United States" (F.B.I. report; see *supra*, p. 7).

The F.B.I. gave I.N.S. Deputy Assistant Commissioner Noto its information that the petitioner was an alien (R. 199). Moreover, Noto was told that the petitioner had entered the country illegally, was using fraudulent documents professing that he was a citizen, and that he was engaged in espionage (R. 199-200; see R. 203-204). These latter facts strongly suggested that the petitioner had not notified the Attorney General of his address. This suggestion was checked against the I.N.S. files (R. 200-202, 214).

Subsequently, I.N.S. agents Schoenenberger and Kanzler were given an F.B.I. report which stated that a "confidential informant who is a defected Soviet intelligence agent" has told the F.B.I. that "Mark" (the petitioner) had been a Soviet espionage agent since 1927 although he had only operated in the United States since 1949, and that "Mark has never obtained any documents which would tend to legalize his status in the United States." The report further stated that an F.B.I. investigation had disclosed that "Mark" was using the aliases of Martin Collins and Emil Goldfus. In addition, Schoenenberger and Kanzler were told by Papich and other F.B.I. agents the "information that had been received from the Federal Bureau of Investigation" (R. 92; see R. 158, 160-161).

Schoenenberger was instructed "to convey to [Murff] all of the information which we had [concerning the petitioner] which could not be communicated on the telephone," (R. 211), and he testified at the pre-trial hearing that he had "furnished [Murff] the information that had been furnished by the Federal Bureau of Investigation" (R. 95). Murff was also given the F.B.I. report (R. 125, 131-132).

In short, the record shows that the F.B.I. had reliable information that the petitioner was an alien and that he had not notified the Attorney General of his address; that this information was conveyed orally by the F.B.I. to I.N.S. Assistant Deputy Commissioner Noto who confirmed that the petitioner had not notified the Attorney General of his address; that this information was then conveyed orally by Noto and several F.B.I. agents and in an F.B.I. report to I.N.S. agents Schoenenberger and Kanzler; and that this information was given to Acting District Director Murff orally by I.N.S. agents Schoenenberger and Kanzler and in the F.B.I. report. Thus, Murff clearly had enough information to constitute a *prima facie* case of a deportable offense.¹¹ And there can

¹¹ Although the government submits that the record shows that Murff had evidence constituting a *prima facie* case, the evidence introduced by the government on this issue was admittedly only an inadvertent by-product of the government's demonstration that the search and seizure were made in good faith. The government did not introduce evidence directly on this issue because the validity of the petitioner's arrest was not challenged by the petitioner in the trial court (see *supra*, pp. 17-20, ns. 4, 5). Thus, if the record on this issue is found to be inconclusive, the validity of the petitioner's arrest depends on questions of fact as to which the government has never had the

hardly be any doubt that the arrest and detention of so important an espionage agent was "necessary" and "desirable" during the deportation proceedings.

2. *The Fourth Amendment is inapplicable to arrests in deportation proceedings*

(a) The requirements imposed by the Fourth Amendment upon the issuance of warrants of arrest—i.e., that they be based on probable cause supported by oath or affirmation—are limited in their application to warrants of arrest issued in criminal cases; they have not been and should not be extended by the Court to warrants issued in deportation cases. Both the history of the Fourth Amendment, and the traditional methods authorized by Congress to effectuate the expulsion from this country of undesirable aliens since almost the very founding of the Republic, militate strongly against a broader construction.

Very recently, in *Frank v. Maryland*, 359 U.S. 360, the Court had occasion to re-examine the history of the Fourth Amendment and to confirm the long-established view that the safeguards contained in the Fourth Amendment were intended to apply only to criminal prosecutions. As the Court there noted (359 U.S. at 363, 365):

The history of the constitutional protection against official invasion of the citizen's home makes explicit the human concerns which it was

opportunity to introduce evidence. Under such circumstances, an issue involving factual issues may not be raised for the first time on appeal. *United States v. DiRe*, 332 U.S. 581, 588; *Giordenello v. United States*, 357 U.S. 480, 487-488; see also *supra*, pp. 14-23.

meant to respect. In years prior to the Revolution leading voices in England and the Colonies protested against the ransacking by Crown officers of the homes of citizens in search of evidence of crime or of illegally imported goods. The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union, as like provisions had already found their way into State Constitutions.

* * * Certainly it is not necessary to accept any particular theory of the interrelationship of the Fourth and Fifth Amendments to realize what history makes plain, that it was on the issue of the right to be secure from searches for evidence to be used in *criminal prosecutions or for forfeitures* that the great battle for fundamental liberty was fought. * * *

[Emphasis added.]

Despite the all-inclusive language of the Fourth Amendment, the courts have consistently refused to extend its requirements to non-criminal processes and proceedings. For example, in the *Frank* case, this Court held that the amendment does not prohibit inspections of dwelling houses without a warrant, for the purpose of ascertaining compliance with local health and safety regulations. Earlier, in *Boyd v. United States*, 116 U.S. 616, 624, the Court observed that:

The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a

judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution * * *.

It has been held that the Fourth Amendment does not require a warrant for the search of business premises and the seizure of goods found therein to be used as evidence in a proceeding to revoke a manufacturer's license. *Camden County Beverage Co. v. Blair*, 46 F. 2d 648, 649-651 (D. N.J.). Nor does the requirement of the Amendment that warrants be issued only on the basis of sworn testimony apply to distress warrants issued to effectuate the collection of delinquent taxes, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 285, 286, or to attachments to authorize seizure of adulterated and mislabeled food and drugs in violation of law. *United States v. Eighteen Cases of Tuna Fish*, 5 F. 2d 979 (W.D. Va.); *United States v. 62 Packages, Etc.*, 48 F. Supp. 878, 884 (W.D. Wisc.), affirmed, 142 F. 2d 107 (C.A. 7).

In *Fong Yue Ting v. United States*, 149 U.S. 698, 730, this Court explained in clear and unambiguous language, that a deportation proceeding

* * * is in no proper sense a trial and sentence for a crime or offence. * * * It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.

See, also, *e.g.*, *Wong Wing v. United States*, 163 U.S. 228; *Mahler v. Eby*, 264 U.S. 32; *Carlson v. Landon*, 342 U.S. 524, 537. Continuing, the Court stated in *Fong Yue Ting* that "the provisions of the Constitution, securing the right of trial by jury, and *prohibiting unreasonable searches and seizures*, and cruel and unusual punishments, have no application" (emphasis added). While the procedures to be followed in deportation proceedings must be reasonable and must afford the alien a fair hearing (see *infra*, pp. 42-45), they need not be the same procedures as are required for a criminal trial.

In recognition of the civil nature of deportation proceedings, the courts have consistently refused to engraft upon them constitutional protections limited to criminal cases. This Court has held that a deportation proceeding is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments. *Zakonaite v. Wolf*, 226 U.S. 272, 275. Accordingly, the right of trial by jury (*Fong Yue Ting v. United States*, *supra*), the privilege against self-incrimination (*Bilokumsky v. Tod*, 263 U.S. 149; *Loufakis v. United States*, 81 F. 2d 966 (C.A. 3); *United States v. Lee Hee*, 60 F. 2d 924 (C.A. 2)), and the defense of former jeopardy (*Bridges v. Wixon*, 144 F. 2d 927 (C.A. 9), reversed on other grounds, 326 U.S. 135; *Sire v. Berkshire*, 185 Fed. 967 (W.D. Tex.)), are inapplicable to such proceedings. And the provisions of the Eighth Amendment guaranteeing the right to reasonable bail and prohibiting cruel and unusual punishments are likewise inapplicable. *Carlson v. Landon*, *supra*; *United States ex rel. Cir-*

cella v. Sahli, 216 F.2d 33 (C.A. 7), certiorari denied, 348 U.S. 964. Moreover, the Court has repeatedly upheld the power of Congress to enact legislation declaring as grounds for deportation the past misconduct of aliens, despite the prohibition contained in Article I, Section 9, of the Constitution against the passage of *ex post facto* legislation. *Bugajewitz v. Adams*, 228 U.S. 585; *Mahler v. Eby*, *supra*; *United States ex rel. Eichenlaub v. Shaughnessy*, 338 U.S. 521; *Harisiades v. Shaughnessy*, 342 U.S. 580; *Galvan v. Press*, 347 U.S. 522.¹²

(b) The history of the deportation legislation enacted by Congress demonstrates a consistent pattern of placing power exclusively in the hands of the President or subordinate officers of the executive branch of the government to arrest and detain aliens,¹³ pending a determination of deportability: Cf. Gordon and Rosenfield, *Immigration Law and Procedure* (1959), ch. V, § 5.1. The first deportation statute specifically conferred the power to arrest deportable aliens upon the President. Act of June 25, 1798, c. 58, § 2, 1 Stat. 571. No further deportation statutes were enacted until many years later, but when Congress in the latter part of the nineteenth century again turned its attention to the problem it vested in the Secretary of the Treasury, who was then charged with the administration of the immigration laws, the

¹² Conversely, the Administrative Procedure Act of 1946, 5 U.S.C. § 1001, *et seq.*, was held applicable to deportation cases in *Wong Yang Sung v. McGrath*, 339 U.S. 33.

¹³ As described above (*supra*, pp. 23-25), arrest is no longer the normal procedure for commencing deportation proceedings but is used when necessary to effectuate the purposes of the Act.

authority, "in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of [the] law, to cause such immigrant * * * to be taken into custody * * *." Act of February 23, 1887, c. 220, 24 Stat. 414, as amended by the Act of October 19, 1888, c. 1210, 25 Stat. 566. A similar provision was enacted in 1903. Act of March 3, 1903, c. 1012, § 21, 32 Stat. 1218. Since 1907, every new deportation statute has specifically provided that an alien may be arrested and taken into custody under the authority of a warrant issued by the head of the executive department charged with the administration of the statute. See Act of February 20, 1907, c. 1134, § 20; 34 Stat. 904; Act of February 5, 1917, c. 29, § 19, 39 Stat. 889; Act of October 16, 1918, c. 186, § 2, 40 Stat. 1012; Act of May 10, 1920, c. 174, 41 Stat. 593; Internal Security Act of 1950, c. 1024, Title I, § 22, 64 Stat. 1008; Immigration and Nationality Act of 1952, c. 477, Title II, § 242, 66 Stat. 208 (8 U.S.C. 1252).

The only federal courts which have considered objections to the issuance of arrest warrants in deportation cases similar to those raised in this case have sustained the validity of such warrants. In *Colyer v. Skeffington*, 265 Fed. 17 (D. Mass.), reversed on other grounds *sub nom. Skeffington v. Katzeff*, 277 Fed. 129 (C.A. 1), the district court held that the fact that warrants of arrest in deportation cases were issued by immigration authorities, relying on information received from the Federal Bureau of Investigation, did not invalidate such warrants. In *Podolski v. Baird*, 94 F. Supp. 294 (E.D. Mich.), the validity of a deportation arrest warrant was upheld against an

objection that it was invalid because not judicially issued. And in *Ex parte Avakian*, 188 Fed. 688, 692 (D. Mass.), the warrant of arrest was held to be "good and valid" despite the contention that it was illegally issued because the application for its issuance was not supported by oath or affirmation as required by the Fourth Amendment. Accord, *Ranieri v. Smith*, 49 F. 2d 537 (C.A. 7), certiorari denied, 284 U.S. 657.

Moreover, although this Court has not previously been asked to rule specifically on the application of the Fourth Amendment to warrants of arrest in deportation cases, it has for almost three quarters of a century consistently upheld deportation proceedings initiated by the arrest of the alien under the authority of such administratively issued warrants—without any suggestion that such warrants were invalid. *E.g.*, *The Japanese Immigrant Case*, 189 U.S. 86, 97-99; *Zakonaite v. Wolf*, *supra*, 226 U.S. 272; *Bilokumsky v. Tod*, *supra*, 263 U.S. 149, *Harisiades v. Shaughnessy*, *supra*, 342 U.S. 580; *Galvan v. Press*, *supra*, 347 U.S. 522. And in *Carlson v. Landon*, *supra*, 342 U.S. 524, the Court held that an alien may be held in the custody of the Attorney General without bail pending the determination of his deportability. The petitioners there had been arrested pursuant to an arrest warrant issued by the Service. While the petitioners challenged only the denial of bail not the basis of their arrest, the holding of this Court that their continued custody was valid necessarily assumed that their arrest was proper.

The legislative construction of the Fourth Amendment—that the issuance of warrants of arrest in de-

portation cases by executive officers was not prohibited—commencing early in our history when the first occasion for this manner of proceeding arose, continuing without exception thereafter, and repeatedly relied upon by the executive, legislative, and judicial branches, is entitled to great weight in deciding whether the issuance of such warrants is constitutionally prohibited. See *Frank v. Maryland*, 359 U.S. 367-370; cf. *McGrain v. Daugherty*, 273 U.S. 135, 156-157; *Myers v. United States*, 272 U.S. 52, 111-175; *Ex Parte Grossman*, 267 U.S. 87, 118-119; *The Laura*, 114 U.S. 411, 413-416; *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 276-280. However important it is to protect aliens from arbitrary action, this Court should not now reverse history by imposing requirements peculiar to the criminal law on the deportation process.¹⁴

¹⁴ Conceivably, it might be contended that the Fourth Amendment, while not applicable in deportation proceedings, is applicable when evidence arising out of such proceedings is introduced at a criminal trial. The validity of the arrest, however, and of the consequent search and seizure is measured by these actions themselves; the subsequent introduction of items seized in a criminal trial cannot retroactively make the earlier actions invalid. The government knows of no case in which items legally seized were held to be excludable. Such a holding would mean that, if as a result of a valid arrest and search by I.N.S. officers, an instrumentality of a criminal offense was fortuitously discovered, the item could not be introduced in evidence. Cf. *Harris v. United States*, 331 U.S. 145. And presumably such evidence could not even be used as a basis for discovering other evidence. That the arrest and search were, in fact, made in good faith for the deportable offense, and not for the criminal offense on which the petitioner was ultimately tried, is demonstrated in our 1958 Brief (pp. 5-6, 39-47; see also *infra*, pp. 40-41).

3. If the Fourth Amendment applies, the arrest here was not unconstitutional since it was made by an authorized official who had probable cause to believe that the petitioner had committed a deportable offense.

(a) If, contrary to the contention of the government discussed above (*supra*, pp. 29-36), the Fourth Amendment applies to deportation proceedings, the arrest of the petitioner was, nevertheless, not illegal since it was made by a duly authorized official who had probable cause to believe that the petitioner was subject to deportation. In criminal cases, even if a criminal warrant is lacking or is for some reason invalid, an arrest is still upheld if the arresting officer had probable cause to believe that an offense has been committed. If the application of the Fourth Amendment is transferred from the criminal field to deportation proceedings, it should carry with it this construction which has been developed in its original application.

The most recent acceptance of the principle that an arrest on probable cause is not in violation of the Fourth Amendment even in the absence of a valid warrant is *Draper v. United States*, 358 U.S. 307. Though the opinion was not unanimous, the dissent is based on disagreement as to the nature of the information necessary to constitute probable cause, not on the underlying principle. See 358 U.S. 307, 315. Indeed, *Draper* is but the most recent in a long line of Supreme Court cases upholding the right to arrest on the basis of probable cause. See, e.g., *United States v. Rabinowitz*, 339 U.S. 56, 60; *Brinegar v. United States*, 338 U.S. 160, 164, 173-174; *Trupiano*

v. *United States*, 334 U.S. 699, 704-705; *Johnson v. United States*, 333 U.S. 10, 15; *Scher v. United States*, 305 U.S. 251, 255; *Marron v. United States*, 275 U.S. 192, 198-199; *United States v. Lee*, 274 U.S. 559, 563; *Agnello v. United States*, 269 U.S. 20, 30; *Carroll v. United States*, 267 U.S. 132, 156-157, 161.

As has already been shown, Acting District Director Murff of the I.N.S. had more than sufficient evidence to justify his determination of a prima facie case (*supra*, pp. 7-8, 26-29). I.N.S. officers Farley and Boyle, who arrested the petitioner (R. 33, 54, 67, 189), having read the F.B.I. report given by Schoenenberger to Murff and participated in the discussion of the case between Schoenenberger and Murff (R. 95-96, 125); possessed the same information known to Murff. Since the requirements of a prima facie case are, if anything, more rigid than those for probable cause (*infra*, pp. 43-44), it is clear that Farley and Boyle likewise had enough information to constitute probable cause.

The fact that the I.N.S. officers, besides having probable cause to justify the arrest, also had a warrant satisfying the Immigration and Nationality Act (and the regulation promulgated thereunder) is irrelevant for constitutional purposes. In these circumstances, the only question under the Constitution is whether the officers had probable cause. Thus, this Court has indicated that, even when law enforcement officers have made an arrest pursuant to a warrant which was not sufficient to authorize it, nevertheless the arrest is constitutionally valid as long as the officers in fact had probable cause. *Stallings v.*

Splain, 253 U.S. 339, 342; *United States v. Rabinowitz*, 339 U.S. 56, 60; cf. *Marron v. United States*, 272 U.S. 192. See also *United States v. Gowen*, 40 F. 2d 593, 595 (C.A. 2), reversed on other grounds *sub nom. Go-Bart Importing Co. v. United States*, 282 U.S. 344; *United States v. Chin On*, 297 Fed. 531, 533 (D. Mass.). In those cases, the legality of the arrest has been sustained even though, at the time of the arrest, the arresting officers were concededly acting under a defective warrant, which they thought was sufficient,¹⁵ and were not acting pursuant to their authority to arrest without warrant. Thus, neither the insufficiency of the warrant, nor the motivation of the arresting officers, invalidates an arrest which could constitutionally have been, but was not, made without a warrant.

In the instant case, however, unlike in *Stallings* and *Rabinowitz*, the governing statute requires more than mere probable cause. The Immigration and Nationality Act requires that arrests be based on warrant of the Attorney General (or his delegate) (Section 242(a), 8 U.S.C. 1252(a)), unless an alien attempts, in the presence of the officer, to enter the United States illegally or the alien "is likely to escape before a warrant can be obtained" (Section 287(a)(2), 8 U.S.C. 1357(a)(2)). Therefore, the government necessarily relies on the I.N.S. warrant to satisfy this

¹⁵ Moreover, in the instant case, the I.N.S. officers were not purporting to act pursuant to a warrant sufficient under the warrant requirements of the Fourth Amendment, as well as under the statute and regulations. The Service has always acted on the belief that the Fourth Amendment does not apply to non-criminal cases such as deportation proceedings.

statutory requirement. But the fact that the I.N.S. officers, in addition to probable cause, had an I.N.S. warrant does not change the constitutional demands of the Fourth Amendment. The warrant is merely a *statutory* requirement beyond the requirement of probable cause imposed by the Constitution. The statutory requirements are fulfilled by compliance with the Act, and the constitutional requirement is satisfied by the existence of probable cause.

(b) The sole contention made by the petitioner in his supplemental brief is that the arrest was made in bad faith and was therefore invalid under the Fourth Amendment. See *Harris v. United States*, 331 U.S. 145, 153. This argument is an extension of the claim made by the petitioner in his main brief that the search was made in bad faith (p. 22), which was answered at length in the government's 1958 Brief (pp. 39-47). As our Statement in that brief showed (pp. 4-23), the arrest, like the search and seizure, was made by I.N.S. officers pursuant to their duty to enforce the immigration laws and was not made in order either to hold the petitioner pending trial for espionage or to obtain evidence relating to such crime.

The only new argument advanced by the petitioner (Supp. Br. 4) is that the issue of good faith is conclusively determined by a statement of J. Edgar Hoover in his book, *Masters of Deceit*. There, Mr. Hoover states that the petitioner was arrested at the request of the F.B.I. Assuming that this was so, the issue is not whether the petitioner was arrested at the request of the F.B.I., but whether the arrest was

made as a bona fide step in effecting his deportation. The record indicates that when Hayhanen stated that he would refuse to testify if called to the stand, the F.B.I. and the Department of Justice determined that they no longer had sufficient evidence to press a criminal case of espionage. See 1958 Gov't Br. pp. 5-6, 45-47. However, the F.B.I. could hardly sit back and permit the petitioner to continue his activities; if he could not be prosecuted and imprisoned, at least he could be stopped by deportation. Therefore, the F.B.I. took its facts to the Immigration Service. It is entirely consistent with the finding of the good faith of the arrest for the F.B.I. to request the I.N.S. to proceed under its immigration authority. The arrest could be brought under a shadow only if the immigration proceeding was a mere subterfuge for taking the petitioner into custody for some other ulterior reason. The evidence before the district court on the motion to suppress and the specific findings of that court (R. 243-244), as sustained by the court below, 258 F. 2d 485, 495, n. 10, completely refute that suggestion.¹⁸

¹⁸ If, as the government contends, the Fourth Amendment does not apply to deportation cases, then it does not apply to searches and seizures incident to deportation arrests, as well as to the arrests. In other words, if the Fourth Amendment does not apply to deportation cases, the search and seizure made in the instant case were constitutionally valid unless they were so intrinsically unfair as to violate due process. But the search and seizure here were fair in every way. As shown above (*supra*, pp. 5-8, 26-29), the arrest was on the basis of abundant evidence that the petitioner had committed an offense subjecting him to deportation. And as our original brief demonstrated, the search and seizure were of a limited scope, permissible in

[fn. cont'd]

4. *The petitioner's arrest was not in violation of due process*

Apart from the Fourth Amendment, deportation proceedings must, of course, conform to the fundamental requirements of due process of law under the Fifth Amendment. *E.g.*, *The Japanese Immigrant Case*, *supra*, 189 U.S. at 101; *Wong Yang Sung v. McGrath*, *supra*, 339 U.S. at 49; *Carlson v. Landon*, *supra*, 342 U.S. at 542; *Galvan v. Press*, *supra*, 347 U.S. at 530-531. We submit, however, that the procedures utilized by the Immigration and Naturalization Service to arrest and detain aliens, pending a determination of deportability, comply fully with due process.

As is noted above (*supra*, pp. 23-25), all deportation proceedings are now initiated by the issuance of an order to show cause by a district director, deputy district director, or district officer in charge of investigations. 22 Fed. Reg. 9796, 8 C.F.R. 242.1(a). The Operations Instructions of the Service (Appendix, *infra*, pp. 52-53) provide that such orders shall issue only when a prima facie case for deportability has been established. Under the regulations promulgated by the Commissioner of the Service, a district director may issue a warrant of arrest when it appears that it is necessary or desirable. 22 Fed. Reg. 9796, 8

criminal cases even under the Fourth Amendment (pp. 33-60).

Even if the Court decides that the Fourth Amendment applies to these civil proceedings, we suggest that the reasonableness of a search or seizure should depend, at least in part, on the nature of the proceeding in which it occurs. That is, a search and seizure may well be reasonable in a deportation proceeding even though it would not be considered reasonable under the stricter standards applicable to criminal proceedings.

C.F.R. 242.2(a), *supra*, pp. 24-25. Such decision to issue a warrant for the arrest and detention of an alien is made only in cases where there is a substantial basis for believing that the alien will abscond or that his detention is necessary to promote the national security. See Gordon and Rosenfield, *Immigration Law and Procedure* (1959), §§ 5.3a, 5.4a.

Since a warrant of arrest is issued contemporaneously with or subsequent to the issuance of an order to show cause, no arrests are authorized unless a *prima facie* case of deportability has been established. This standard is at least as demanding as the probable cause required for issuing a warrant of arrest on a criminal charge. *Prima facie* evidence of a fact was defined by Mr. Justice Story as such evidence as "in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose" *Kelly v. Jackson*, 6 Pet. 622, 632. See also *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 268; *United States v. Wiggins*, 14 Pet. 334, 337; *Parker v. Overman*, 18 How. 137, 141-142; *United States v. Green*, 136 Fed. 618, 631 (N.D.N.Y.). In comparison, in *Dambra v. United States*, 268 U.S. 435, 441, this Court defined probable cause:

In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed.
* * * [I]f the apparent facts set out in the affidavit are such that a reasonably discrete and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.

See also *Carroll v. United States*, 267 U.S. 132, quoted in *Draper v. United States*, 358 U.S. 307, 313, and *Brinegar v. United States*, 338 U.S. 160, 175-176. Thus, the requirement of a prima facie case is a fair and reasonable basis upon which to initiate deportation proceedings, and to arrest and detain aliens when these latter measures are necessary or desirable in order to effectively carry out the deportation process. Governmental action based upon the proper application of such a standard is consistent with the fair play and ordered liberty which the due process clause of the Constitution guarantees.

Unlike the procedure in criminal cases, an immigration warrant is not required to be based on information supplied under oath or affirmation. However, that such formality is not essential to due process is clearly shown by the fact that criminal arrests made without warrants on the basis of probable cause, which indeed may be hearsay evidence solely, are upheld. See *Draper v. United States*, 358 U.S. 307. Certainly, there is no reason why due process requirements should require more formality in case of an administrative proceeding such as deportation than in a criminal case. As the Court recognized in *The Japanese Immigrant Case*, 189 U.S. 86, 101, in order to meet due process a hearing need not meet "the forms of judicial procedure" but must be "appropriate to the nature of the case."

Since, as we have shown (*supra*, pp. 7-8, 26-29), Acting District Director Murff had more than enough evidence on which to base his determination of a prima facie case (and therefore of probable cause) of

the petitioner's deportability, the petitioner's arrest did not violate due process.

II.

THE PETITIONER'S ARREST WAS LEGAL REGARDLESS OF THE VALIDITY OF THE ARREST WARRANT SINCE THE PETITIONER WAS ACTUALLY COMMITTING A MISDEMEANOR IN THE PRESENCE OF THE ARRESTING OFFICER

AT THIS BASIS FOR SUSTAINING THE LEGALITY OF THE ARREST IS PROPERLY BEFORE THE COURT

The government has argued above that the validity of the petitioner's arrest, not having been challenged before the trial court, may not properly be considered for the first time by this Court (*supra*, pp. 14-23). If, however, the Court decides to consider the validity of the petitioner's arrest, it is obvious that the government too must be allowed to make contentions (*infra*, pp. 46-50) for the first time in order to sustain that arrest. Unlike *Giordenello v. United States*, 357 U.S. 480, the government has never previously had any reason to justify the arrest at an earlier stage of the proceeding since the petitioner never questioned the validity of his arrest. In fact, the only issue the petitioner raises in his supplemental brief, covering the validity of his arrest, is his contention that the arrest was not made in good faith. Thus, even now the petitioner does not raise the issue which the present arguments of the government are intended to answer—that I.N.S. warrants, whether made in good or bad faith, do not satisfy the warrant standards of the Fourth Amendment and therefore all arrests on the basis of such warrants are invalid.

In addition, even if the Court agrees that the validity of the arrest is not properly before it, nevertheless the arguments which the government makes here to sustain the validity of the arrest should be considered by the Court insofar as they bear on the validity of the search incident to the arrest (see *supra*, pp. 14-16, n. 3, pp. 41-42, n. 16). It is well established that the respondent may urge any argument in support of the judgment below (see, e.g., *Langnes v. Green*, 282 U.S. 531, 535-539) unless consideration of the argument would raise factual issues at a time when the petitioner would be unfairly deprived of an opportunity to respond (*Giordenello v. United States*, *supra*, 357 U.S. at 487-488). However, the government's new contentions—that the Fourth Amendment does not apply to deportation proceedings (*supra*, pp. 29-36); that, in any event, the arrest was valid under the Fourth Amendment because the arresting officers had probable cause (*supra*, pp. 37-41); and that the arrest was valid because the petitioner was committing a misdemeanor in the officer's presence (*infra*, pp. 46-50)—do not involve any factual issues which are not clearly resolved by the evidence in the present record. Therefore, the petitioner would not be unfairly prejudiced by the Court's consideration of all the government's arguments which support the search and seizure, as well as the arrest.

B. THE PETITIONER'S CONTINUING OFFENSE UNDER THE IMMIGRATION AND NATIONALITY ACT JUSTIFIED HIS ARREST

Even if the Fourth Amendment applies to deportation proceedings and even if it renders the warrant of arrest invalid, the petitioner was nevertheless prop-

erly arrested. He failed to notify the Attorney General of his address, which constitutes a misdemeanor under Section 266 of the Immigration and Nationality Act (8 U.S.C. 1306(b)), as well as a deportable offense. This obligation to notify the Attorney General is a continuing one and therefore an alien who fails to register is guilty of a continuing offense. See *United States v. Franklin*, 188 F. 2d 182, 187 (C.A. 7); cf. *United States v. Cores*, 356 U.S. 405; *United States v. Guertler*, 147 F. 2d 796 (C.A. 2), certiorari denied, 325 U.S. 879; *McGregor v. United States*, 206 F. 2d 583 (C.A. 4); *Fogel v. United States*, 162 F. 2d 54 (C.A. 5), certiorari denied, 332 U.S. 791. Thus, the petitioner was committing a misdemeanor at the very moment that he was arrested.

Although Sections 242(a) and 287(a) of the Act (8 U.S.C. 1252(a), 1357(a)) give I.N.S. officers authority to make arrests for deportation offenses and for felonies, the Act makes no provision for misdemeanors. Under these circumstances, where no federal statute either authorizes or prohibits arrests for federal offenses, the validity of the arrest is determined by the law of the state in which the arrest is made. *United States v. Di Re*, 332 U.S. 581, 589-591; *Pon v. United States*, 168 F. 2d 373, 374 (C.A. 1); *United States v. Coplon*, 185 F. 2d 629, 633-634 (C.A. 2), certiorari denied, 342 U.S. 920; *Coplon v. United States*, 191 F. 2d 749, 753 (C.A. D.C.), certiorari denied, 342 U.S. 926; see *Johnson v. United States*, 333 U.S. 10, 15, n. 5. In determining his authority to make the arrest, the officer is regarded as a private person. *United States v. Coplon*, *supra*, 185

F. 2d at 634; *Coplon v. United States, supra*, 191 F. 2d at 753. The law of New York (where the petitioner was arrested) provides that "A private person may arrest * * * [f]or a crime, committed or attempted in his presence * * *." N.Y. Code Crim. Pro. § 183.

In the instant case, the petitioner was committing a crime in the presence of the arresting officers. The F.B.I. agents, ~~before~~ interviewing the petitioner, knew that he occupied room 839 (R. 97, 137, 175) and that he was committing the offense of having failed to notify the Attorney General of his address (see *supra*, pp. 5-8, 26-29). Standing in the hall outside room 839 of the Hotel Latham, the agents knocked on his door (R. 175). The petitioner answered "Just a minute" or "Just a moment", and opened the door (R. 175). When the petitioner opened the door, the F.B.I. agents were legally in the presence of a person who was committing a crime in their presence and they could have made an arrest. Subsequently, the I.N.S. officers were informed by the F.B.I. that they could enter the room to effect the petitioner's arrest. When the I.N.S. agents stood at the door of the room, they likewise were lawfully in the presence of a person who was then committing a crime.

It is, of course, true that the I.N.S. deliberately decided to institute deportation proceedings against the petitioner (R. 217-218, 220, 223-224) rather than to press criminal charges, and that therefore the order to show cause charged the petitioner only with a de-

portable offense (R. 34-36). But this Court has made it clear that an arrest may be upheld on a theory which was not in the minds of arresting officers. Thus, the Court has held that, even if the warrant upon which an arrest is based is invalid, nevertheless the arrest is valid if the arresting officers had probable cause to believe that the suspect committed the offense charged in the warrant. See cases cited *supra*, pp. 38-39. Moreover, in *United States v. Rabinowitz*, 339 U.S. 56, the Court indicated that, regardless of whether the arrest warrant was sufficient, an arrest is valid if the arresting officers have probable cause to believe that the suspect has committed an offense in their presence, even though that offense is not the same as that charged in the warrant. After the Court first stated that the warrant was, "as far as can be ascertained, broad enough to cover the crime of possession" of forged and altered postage stamps, it went on to say that, even if the warrant did not include that offense, "the arrest therefor was valid because the officers had probable cause to believe that [this] felony" was being committed in their very presence." *Id.* at 60. While in *Rabinowitz* the offense of possession of forged and altered stamps was closely related to the offense which was clearly included within the scope of the warrant (sale of forged and altered stamps), here the two

In *Rabinowitz*, felonies were involved, but there seems no reason to distinguish a case involving a misdemeanor committed in the officers' presence where the arresting officers have authority to arrest for such misdemeanors under the applicable law.

offenses are virtually identical although the penalties are of course different.¹⁸

Under the principle stated in *Rabinowitz*, the petitioner's arrest is valid since the arresting officers had authority under New York law to arrest for the commission of a crime in their presence even though they in fact intended to arrest the petitioner for the deportation offense. Otherwise, the government would be unfairly paralyzed when arresting officers, having several grounds on which to arrest a suspect, happen to choose an invalid rather than a valid ground. The unfairness would be particularly severe in the instant case since the arresting officers could hardly foresee that the arrest procedures which have been used ever since the enactment of immigration legislation would be successfully challenged.

¹⁸ Both the misdemeanor (8 U.S.C. 1306(b)) and deportation offense (8 U.S.C. 1251(a)(5)) are defined as failure to comply with 8 U.S.C. 1305, which requires the alien to notify the Attorney General of his address. The only difference in the definitions is that Section 1251(a)(5) absolves the alien if "he establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful" while Section 1306(b), at least by its terms, does not.

CONCLUSION

For the foregoing reasons, and those set forth in our brief at the 1958 term, it is respectfully submitted that the judgment of the court below should be affirmed.

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Solicitor General.

J. WALTER YEAGLEY,

Assistant Attorney General.

JOHN F. DAVIS,

Assistant to the Solicitor General.

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Attorneys.

OCTOBER 1959.

APPENDIX

IMMIGRATION AND NATURALIZATION SERVICE OPERATIONS INSTRUCTIONS

PART 242 *Proceedings to determine deportability of aliens in the United States: apprehension, custody, hearing, and appeal.* (2-6-56; CO 242-P)

SECTION 242 (a)—APPREHENSION AND DETENTION OF DEPORTABLE ALIENS

1. *Commencement.* (a) *General.* Every deportation proceeding shall be commenced with the issuance and service of an order to show cause; the preparation of the entire order to show cause is an investigative responsibility. Application for the order to issue on Form I-265 shall be made by an investigator when a prima facie case for deportability has been established. As a general rule, an application for an order to show cause shall not be made unless the evidence supporting the charges are at hand.

If expatriation is involved in a case, the application for an order to show cause shall be supported by a recorded, verbatim question-and-answer statement, which shall be taken through an interpreter if there is any possibility that the subject may use as a defense, his inability to speak or understand English.

It shall be discretionary with the district director whether to institute deportation proceedings or to withhold action in favor of the naturalization process in the case of a petitioner for naturalization who is prima facie both deportable and eligible for naturalization. A district director in his discretion, and subject to approval by the regional commissioner, may

cancel an order to show cause and terminate proceedings thereunder when the alien is prima facie eligible for naturalization. Such discretion shall not be exercised unless the case involves appealing humanitarian factors (see paragraph 1, OI-9—Assistant Commissioner, Investigations Division). (*Added 5-31-57*)

When a district director is in doubt as to the course of action in a particular case he may submit a request for an advisory opinion to the regional office. If, in the opinion of the regional office, a case presents a sufficiently complex or difficult question, that office may submit a request for an advisory opinion to the Assistant Commissioner, Investigations Division, Central Office. (*6-15-57*)

FILE COPY

No. 2

Office Supreme Court, U.S.

FILED

OCT. 27 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,

Petitioner,

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL REPLY BRIEF FOR PETITIONER.

JAMES B. DONOVAN,

Attorney for Petitioner,

Office and P. O. Address,

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123 Remsen Street,

Brooklyn 1, N. Y.

THOMAS M. DEREVOISE, II,

Of Counsel.

October 27, 1959.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No. 2

RUDOLF IVANOVICH ABEL, also known as "Mark" and also
known as Martin Collins and Emil R. Goldfus,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

**SUPPLEMENTAL REPLY BRIEF FOR
PETITIONER.**

The Government has attempted to avoid the issue before the Court by arguing at length the validity of petitioner's arrest—for purposes of deportation as an alien illegally in the United States.

However, the fact is that petitioner was not so deported but instead was indicted, tried and convicted of the capital crime of espionage on the basis of process which does not pretend to conform to the requirements of our Constitution. This is the case at bar and, as this Court has said, "That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, fall short of such denial." *Betts v. Brady*, 316 U. S. 455 at 462 (1942). Cf. *Helvering*

v. *Mitchell*, 303 U. S. 391, 400, 402 (1937); *Federal Communications Commission v. Station WJR*, 337 U. S. 265, 275 (1949).

All fifty three pages of legalistic argument in the Government's new brief cannot obscure the fact that by administrative legerdemain, petitioner and all his effects were made to disappear from public knowledge in the United States for a period of at least three days, notwithstanding the simple mandate of the Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Respectfully submitted,

JAMES B. DONOVAN,
Attorney for Petitioner.

THOMAS M. DEBEVOISE, II,
Of Counsel.

PETITION FOR REHEARING

FILE COPY

No. 2

Office Supreme Court, U.S.

FILED

APR 22 1960

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

RUDOLF IVANOVICH ABEL, also known as "Mark" and
also known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**MOTION FOR LEAVE TO FILE PETITION, AND
PETITION, FOR REHEARING.**

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% BROOKLYN BAR ASSOCIATION,

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IN THE
Supreme Court of the United States

RUDOLF IVANOVICH ABEL, also known as "Mark" and also
known as Martin Collins and Emil R. Goldfus,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**MOTION FOR LEAVE TO FILE PETITION
FOR REHEARING.**

Petitioner respectfully moves for leave to file the annexed petition for rehearing of the decision of this Court affirming the judgment of the Court of Appeals for the Second Circuit in this case, entered in this Court on March 28, 1960. Rehearing is sought at this time because, as is pointed out more fully in the annexed petition, the full impact of this decision upon the rights of alien residents has not been, but should be, fully presented to the Court.

JAMES B. DONOVAN,
Attorney for Petitioner.

Dated: April 20, 1960.

Petition for Rehearing of Decision.

Petitioner prays that this Court grant rehearing of its decision of March 28, 1960 affirming the judgment of the Court of Appeals for the Second Circuit in the above entitled case.

Reasons for Granting Rehearing.

This petition is made on behalf of the innocent millions of United States residents, subject to the Immigration and Naturalization Laws, whose personal liberties have been severely and unjustly curtailed by this Court's decision in the case at bar. The recent majority opinion of the Court grants to administrative officials possessing no search warrant (but who had ample time to have obtained one), greater power over a suspect's person and property than is permitted to law enforcement officers who obtain judicially authorized arrest and search warrants complying in every respect with the requirements of the Fourth Amendment to the Constitution of the United States. The salutary "good faith" rule enunciated in *Harris v. United States*, 331 U. S. 145 (1947) has been emasculated; the way has been opened for every type of police subterfuge, such as was judicially condemned in *United States v. Valente*, 155 F. Supp. 577 (Mass. 1957).

The conclusion is inescapable that the full impact of this decision upon the rights of alien residents has not been, but should be, fully presented to the Court. Upon this ground rehearing should be granted.

Grave constitutional issues were presented in this case. If it had been realized that the determination of these issues

would be decisively influenced by the irrelevant question of whether Abel was a Soviet intelligence agent, Abel's petition for certiorari would never have been brought. The decisions of the courts below would have stood undisturbed and thereafter, as legal precedents, would have been wisely and charitably regarded by bench and bar as applicable only to the precise facts of Abel's case.

No effort will be made herein to detail the manifest errors and omissions in the Court's decision. See Note, 107 U. Pa. L. Rev. 1192 (1959). This petition is futile if five members of the Court believe that the majority opinion in this case establishes sound rules of law and, in the great traditions of this Court, properly protects the rights granted to all living in the free society guaranteed by our Constitution. We ask only that, in considering this petition, each Justice rigorously examine his judicial conscience.

Conclusion.

For the reasons set forth above and in the briefs previously submitted to the Court, it is respectfully urged that rehearing be granted and that, upon such rehearing, the judgment below be reversed and the matter remanded for further disposition not inconsistent with the opinion of this Court.

JAMES B. DONOVAN,
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Brooklyn Bar Association,
123 Remsen Street,
Brooklyn 1, N. Y.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay; it is in accordance with Rules 39 and 33 of this Court.

JAMES B. DONOVAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1959.

Rudolf Ivanovich Abel, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus, Petitioner. v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[March 28, 1960.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

The question in this case is whether seven items were properly admitted into evidence at the petitioner's trial for conspiracy to commit espionage. All seven items were seized by officers of the Government without a search warrant. The seizures did not occur in connection with the exertion of the criminal process against petitioner. They arose out of his administrative arrest by the United States Immigration and Naturalization Service as a preliminary to his deportation. A motion to suppress these items as evidence, duly made in the District Court, was denied after a full hearing. 155 F. Supp. 8. Petitioner was tried, convicted and sentenced to thirty years' imprisonment and to the payment of a fine of \$3,000. The Court of Appeals affirmed, 258 F. 2d 485. We granted certiorari, 358 U. S. 813, limiting the grant to the following two questions:

"1. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated by a search and the seizure of evidence without a search warrant, after an alien suspected and officially accused of espionage has been taken into custody for deportation, pursuant to an administrative Immi-

gration Service warrant, but has not been arrested for the commission of a crime?

"2. Whether the Fourth and Fifth Amendments to the Constitution of the United States are violated when articles so seized are unrelated to the Immigration Service warrant and, together with other articles obtained from such leads, are introduced as evidence in a prosecution for espionage?"

Argument was first heard at October Term, 1958. The case having been set down for reargument at this Term, 359 U. S. 940, counsel were asked to discuss a series of additional questions, set out in the margin.*

We have considered the case on the assumption that the conviction must be reversed should we find challenged items of evidence to have been seized in violation of the Constitution and therefore improperly admitted into evidence. We find, however, that the admission of these items was free from any infirmity and we affirm the judgment. (Of course the nature of the case, the fact that it was a prosecution for espionage, has no bearing whatever upon the legal considerations relevant to the admissibility of evidence.)

* "1. Whether under the laws and Constitution of the United States (a) the administrative warrant of the New York Acting District Director of the Immigration and Naturalization Service was validly issued, (b) such administrative warrant constituted a valid basis for arresting petitioner or taking him into custody, and (c) such warrant furnished a valid basis for the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham.

"2. Whether, independently of such administrative warrant, petitioner's arrest, and the searches and seizures affecting his person, luggage, and the room occupied by him at the Hotel Latham, were valid under the laws and Constitution of the United States.

"3. Whether on the record before us the issues involved in Questions '1 (a),' '1 (b),' and '2' are properly before the Court."

The seven items, all in petitioner's possession at the time of his administrative arrest, whose admissibility is in question were the following:

(1) a piece of graph paper, carrying groups of numbers arranged in rows, allegedly a coded message;

(2) a forged birth certificate, certifying the birth of "Martin Collins" in New York County in 1897;

(3) a birth certificate, certifying the birth of "Emil Goldfus" in New York in 1902 (Emil Goldfus died in 1903);

(4) an international certificate of vaccination, issued in New York to "Martin Collins" in 1957;

(5) a bank book of the East River Savings Bank containing the account of "Emil Goldfus";

(6) a hollowed-out pencil containing 18 micro-films;

(7) a block of wood, wrapped in sandpaper, and containing within it a small booklet with a series of numbers on each page, a so-called "cipher pad."

Items (2), (3), (4) and (5) were relevant to the issues of the indictment for which petitioner was on trial in that they corroborated petitioner's use of false identities. Items (1), (6) and (7) were incriminatory as useful means for one engaged in espionage.

The main claims which petitioner pressed upon the Court may be thus summarized: (1) the administrative arrest was used by the Government in bad faith; (2) administrative arrests as preliminaries to deportation are unconstitutional; and (3) regardless of the validity of the administrative arrest here, the searches and seizures through which the challenged items came into the Government's possession were not lawful ancillaries to such an arrest. These claims cannot be judged apart from the circumstances leading up to the arrest and the nature of

the searches and seizures. It becomes necessary to relate these matters in considerable detail.

Petitioner was arrested by officers of the Immigration and Naturalization Service (hereafter abbreviated as I. N. S.) on June 21, 1957, in a single room in the Hotel Latham in New York City, his then abode. The attention of the I. N. S. had first been drawn to petitioner several days earlier when Noto, a Deputy Assistant Commissioner of the I. N. S., was told by a liaison officer of the Federal Bureau of Investigation (hereafter abbreviated as F. B. I.) that petitioner was believed by the F. B. I. to be an alien residing illegally in the United States. Noto was told of the F. B. I.'s interest in petitioner in connection with espionage.

An uncontested affidavit before the District Court asserted the following with regard to the events leading up to the F. B. I.'s communication with Noto about petitioner. About one month before the F. B. I. communicated with Noto, petitioner had been mentioned by Hayhanen, a recently defected Russian spy, as one with whom Hayhanen had for several years cooperated in attempting to commit espionage. The F. B. I. had thereupon placed petitioner under investigation. At the time the F. B. I. communicated with the I. N. S. regarding petitioner, the case against him rested chiefly upon Hayhanen's story, and Hayhanen, although he was later to be the Government's principal witness at the trial, at that time insisted that he would refuse to testify should petitioner be brought to trial, although he would fully cooperate with the Government in secret. The Department of Justice concluded that without Hayhanen's testimony the evidence was insufficient to justify petitioner's arrest and indictment on espionage charges. The decision was thereupon made to bring petitioner to the attention of the I. N. S., with a view to commencing deportation proceedings against him.

Upon being notified of the F. B. I.'s belief that petitioner was residing illegally in this country, Noto asked the F. B. I. to supply the I. N. S. with further information regarding petitioner's status as an alien. The F. B. I. did this within a week. The I. N. S. concluded that if petitioner were, as suspected, an alien, he would be subject to deportation in that he had failed to comply with the legal duty of aliens to notify the Attorney General every January of their address in the United States. 8 U. S. C. § 1305. Noto then determined on petitioner's administrative arrest as a preliminary to his deportation. The F. B. I. was so informed. On June 20, two I. N. S. officers, Schoenenberger and Kanzler, were dispatched by Noto to New York to supervise the arrest. These officers carried with them a warrant for petitioner's arrest and an order addressed to petitioner directing him to show cause why he should not be deported. They met in New York with the District Director of the I. N. S. who, after the information in the possession of the I. N. S. regarding petitioner was put before him, signed the warrant and the order. Following this, Schoenenberger and Kanzler went to F. B. I. headquarters in New York where, by prearrangement with the F. B. I. in Washington, they were met by several F. B. I. officers. These agreed to conduct agents of the I. N. S. to petitioner's hotel so that the I. N. S. might accomplish his arrest. The F. B. I. officer in charge asked whether, before the petitioner was arrested, the F. B. I. might "interview" him in an attempt to persuade him to "cooperate" with regard to his espionage. To this Schoenenberger agreed.

At 7 o'clock the next morning, June 21, two officers of the I. N. S. and several F. B. I. men gathered in the corridor outside petitioner's room at the Hotel Latham. All but two F. B. I. agents, Gamber and Blasco, went into the room next to petitioner's, which the F. B. I. had occupied in the course of their investigation of petitioner.

Gamber and Blasco were charged with confronting petitioner and soliciting his cooperation with the F. B. I. They had no warrant either to arrest or search. If petitioner proved cooperative their instructions were to telephone to their superior for further instructions. If petitioner failed to cooperate they were to summon the waiting I. N. S. agents to execute their warrant for his arrest.

Gamber rapped on petitioner's door. When petitioner released the catch, Gamber pushed open the door and walked into the room; followed by Blasco. The door was left ajar and a third F. B. I. agent came into the room a few minutes later. Petitioner, who was nude, was told to put on a pair of undershorts and to sit on the bed, which he did. The F. B. I. agents remained in the room questioning petitioner for about twenty minutes. Although petitioner answered some of their questions, he did not "cooperate" regarding his alleged espionage. A signal was thereupon given to the two agents of the I. N. S. waiting in the next room. These came into petitioner's room and served petitioner with the warrant for his arrest and with the order to show cause. Shortly thereafter Schoenenberger and Kanzler, who had been waiting outside the hotel, also entered petitioner's room. These four agents of the I. N. S. remained with petitioner in his room for about an hour. For part of this time an F. B. I. agent was also in the room and during all of it another F. B. I. agent stood outside the open door of the room, where he could observe the interior.

After placing petitioner under arrest, the four I. N. S. agents undertook a search of his person and of all of his belongings in the room, and the adjoining bathroom, which lasted for from fifteen to twenty minutes. Petitioner did not give consent to this search; his consent was not sought. The F. B. I. agents observed this search but took no part in it. It was Schoenenberger's testimony to the District Court that the purpose of this search was to

discover weapons and documentary evidence of petitioner's "alienage"; that is, documents to substantiate the information regarding petitioner's status as an alien which the I. N. S. had received from the F. B. I. During this search one of the challenged items of evidence, the one we have designated (2), a birth certificate for "Martin Collins," was seized. Weapons were not found, nor was any other evidence regarding petitioner's "alienage."

When the search was completed, petitioner was told to dress himself, to assemble his things and to choose what he wished to take with him. With the help of the I. N. S. agents almost everything in the room was packed into petitioner's baggage. A few things petitioner deliberately left on a window sill, indicating that he did not want to take them, and several other things which he chose not to pack up into his luggage he put into the room's wastepaper basket. When everything had been assembled, petitioner asked and received permission to repack one of his suitcases. While petitioner was doing so, Schoenenberger noticed him slipping some papers into the sleeve of his coat. Schoenenberger seized these. One of them was the challenged item of evidence which we have designated (1), a piece of graph paper containing a coded message.

When petitioner's belongings had been completely packed, petitioner agreed to check out of the hotel. One of the F. B. I. agents obtained his bill from the hotel and petitioner paid it. Petitioner was then handcuffed and taken, along with his baggage, to a waiting automobile and thence to the headquarters of the I. N. S. in New York. At I. N. S. headquarters, the property petitioner had taken with him was searched more thoroughly than it had been in his hotel room, and three more of the challenged items were discovered and seized. These were those we have designated (3), (4) and (5), the "Emil Goldfus" birth certificate, the international vaccination certificate, and the bank book.

As soon as petitioner had been taken from the hotel, an F. B. I. agent, Kehoe, who had been in the room adjoining petitioner's during the arrest and search and who, like the I. N. S. agents, had no search warrant, received permission from the hotel management to search the room just vacated by petitioner. Although the bill which petitioner had paid entitled him to occupy the room until 3 p. m. of that day, the hotel's practice was to consider a room vacated whenever a guest removed his baggage and turned in his key. Kehoe conducted a search of petitioner's room which lasted for about three hours. Among other things, he seized the contents of the wastepaper basket into which petitioner had put some things while packing his belongings. Two of the items thus seized were the challenged items of evidence we have designated (6) and (7): a hollow pencil containing microfilm and a block of wood containing a "cipher pad."

Later in the day of his arrest, petitioner was taken by airplane to a detention center for aliens in Texas. He remained there for several weeks until arrested upon the charge of conspiracy to commit espionage for which he was brought to trial and convicted in the Eastern District of New York.

I.

The underlying basis of petitioner's attack upon the admissibility of the challenged items of evidence concerns the motive of the Government in its use of the administrative arrest. We are asked to find that the Government resorted to a subterfuge, that the Immigration and Naturalization Service warrant here was a pretense and sham, was not what it purported to be. According to petitioner, it was not the Government's true purpose in arresting him under this warrant to take him into custody pending a determination of his deportability. The Government's real aims, the argument runs, were (1) to place petitioner in custody so that pressure might be brought to bear upon

him to confess his espionage and cooperate with the F. B. I., and (2) to permit the Government to search through his belongings for evidence of his espionage to be used in a designed criminal prosecution against him. The claim is, in short, that the Government used this administrative warrant for entirely illegitimate purposes and articles seized as a consequence of its use ought to have been suppressed.

Were this claim justified by the record, it would indeed reveal a serious misconduct by law-enforcing officers. The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts. The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States. A finding of bad faith is, however, not open to us on this record. What the motive was of the I. N. S. officials who determined to arrest petitioner, and whether the I. N. S. in doing so was not exercising its powers in the lawful discharge of its own responsibilities but was serving as a tool for the F. B. I. in building a criminal prosecution against petitioner, were issues fully canvassed in both courts below. The crucial facts were found against the petitioner.

On this phase of the case the district judge, having permitted full scope to the elucidation of petitioner's claim, having seen and heard witnesses, in addition to testimony by way of affidavits, and after extensive argument, made these findings:

"[T]he evidence is persuasive that the action taken by the officials of the Immigration and Naturalization Service is found to have been in entire good faith. The testimony of Schoenenberger and Noto leaves no doubt that while the first information that came to them concerning the [petitioner] . . . was furnished

by the F. B. I.—which cannot be an unusual happening—the proceedings taken by the Department differed in no respect from what would have been done in the case of an individual concerning whom no such information was known to exist.

“The defendant argues that the testimony establishes that the arrest was made under the direction and supervision of the F. B. I., but the evidence is to the contrary, and it is so found.”

“No good reason has been suggested why these two branches of the Department of Justice should not cooperate, and that is the extent of the showing made on the part of the defendant.” 155 F. Supp. 8, 11.

The opinion of the Court of Appeals, after careful consideration of the matter, held that the answer “must clearly be in the affirmative” “whether the evidence in the record supports the finding of good faith made by the court below.” 258 F. 2d 485, 494.

Among the statements in evidence relied upon by the lower courts in making these findings was testimony by Noto, that the interest of the I. N. S. in petitioner was confined to petitioner's illegal status in the United States; that in informing the I. N. S. about petitioner's presence in the United States the F. B. I. did not indicate what action it wanted the I. N. S. to take; that Noto himself made the decision to arrest petitioner and to commence deportation proceedings against him; that the F. B. I. made no request to him to search for evidence of espionage at the time of the arrest; and that it was “usual and mandatory” for the F. B. I. and I. N. S. to work together in the manner they did. There was also the testimony of Schoenenberger, regarding the purpose of the search he made of petitioner's belongings, that the motive was to look for weapons and documentary evidence of alienage.

To be sure, the record is not barren of evidence supporting an inference opposed to the conclusion to which the two lower courts were led by the record as a whole: for example, the facts that the I. N. S. held off its arrest of petitioner while the F. B. I. solicited his cooperation, and that the F. B. I. held itself ready to search petitioner's room as soon as it was vacated. These elements, however, did not, and were not required to, persuade the two courts below in the face of ample evidence of good faith to the contrary, especially the human evidence of those involved in the episode. We are not free to overturn the conclusion of the courts below when justified by such solid proof.

Petitioner's basic contention comes down to this: even without a showing of bad faith, the F. B. I. and I. N. S. must be held to have cooperated to an impermissible extent in this case, the case being one where the alien arrested by the I. N. S. for deportation was also suspected by the F. B. I. of crime. At the worst, it may be said that the circumstances of this case reveal an opportunity for abuse of the administrative arrest. But to hold illegitimate, in the absence of bad faith, the cooperation between I. N. S. and F. B. I. would be to ignore the scope of rightful cooperation between two branches of a single Department of Justice concerned with enforcement of different areas of law under the common authority of the Attorney General.

The facts are that the F. B. I. suspected petitioner both of espionage and illegal residence in the United States as an alien. That agency surely acted not only with propriety but in discharge of its duty in bringing petitioner's illegal status to the attention of the I. N. S., particularly after it found itself unable to proceed with petitioner's prosecution for espionage. Only the I. N. S. is authorized to initiate deportation proceedings, and certainly the F. B. I. is not to be required to remain mute regarding one

they have reason to believe to be a deportable alien, merely because he is also suspected of one of the gravest of crimes and the F. B. I. entertains the hope that criminal proceedings may eventually be brought against him. The I. N. S.; just as certainly, would not have performed its responsibilities had it been deterred from instituting deportation proceedings solely because it became aware of petitioner through the F. B. I., and had knowledge that the F. B. I. suspected petitioner of espionage. The Government has available two ways of dealing with a criminally suspect deportable alien. It would make no sense to say that branches of the Department of Justice may not cooperate in pursuing one course of action or the other, once it is honestly decided what course is to be preferred. For the same reasons this cooperation may properly extend to the extent and in the manner in which the F. B. I. and I. N. S. cooperated in affecting petitioner's administrative arrest. Nor does it taint the administrative arrest that the F. B. I. solicited petitioner's cooperation before it took place, stood by while it did, and search the vacated room after the arrest. The F. B. I. was not barred from continuing its investigation in the hope that it might result in a prosecution for espionage because the I. N. S., in the discharge of its duties had embarked upon an independent decision to initiate proceedings for deportation.

The Constitution does not require that honest law enforcement should be put to such an irrevocable choice between two recourses of the Government. For a contrast to the proper cooperation between two branches of a single Department of Justice as revealed in this case, see the story told in *Colyer v. Skeffington*, 265 F. 17. That case sets forth in detail the improper use of immigration authorities by the Bureau of Investigation of the Department of Justice when the immigration service was

a branch of the Department of Labor and was acting not within its lawful authority but as the cat's paw of another, unrelated branch of the Government.

We emphasize again that our view of the matter would be totally different had the evidence established, or were the courts below not justified in not finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime. The record precludes such a finding by this Court.

II.

The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for "warrants" under the Fourth Amendment, is not entitled to our consideration in the circumstances before us. It was not made below; indeed, it was expressly disavowed. Statutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time. It would emphasize the disregard for the presumptive respect the Court owes to the validity of Acts of Congress, especially when confirmed by uncontested historical legitimacy, to bring into question for the first time such a long-sanctioned practice of government at the behest of a party who not only did not challenge the exercise of authority below, but expressly acknowledged its validity.

The grounds relied on in the trial court and the Court of Appeals by petitioner were solely (in addition to the insufficiency of the evidence, a contention not here for review) (1) the bad faith of the Government's use of

the administrative arrest warrant and (2) the lack of a power incidental to the execution of an administrative warrant to search and seize articles for use as evidence in a later criminal prosecution. At no time did petitioner question the legality of the administrative arrest procedure either as unauthorized or as unconstitutional. Such challenges were, to repeat, disclaimed. At the hearing on the motion to suppress, petitioner's counsel was questioned by the court regarding the theory of relief relied upon:

"The Court: They [the Government] were not at liberty to arrest him [petitioner]?"

"Mr. Fraiman: No, your Honor.

"They were perfectly proper in arresting him.

"We don't contend that at all.

"As a matter of fact, we contend it was their duty to arrest this man as they did.

"I think it should show, or rather, it showed admirable thinking on the part of the F. B. I. and the Immigration Service.

"We don't find any fault with that.

"Our contention is that although they were permitted to arrest this man, and in fact, had a duty to arrest this man in a manner in which they did, they did not have a right to search his premises for the material which related to espionage.

"... He was charged with no criminal offense in this warrant.

"The Court: He was suspected of being illegally in the country, wasn't he?"

"Mr. Fraiman: Yes, your Honor.

"The Court: He was properly arrested.

"Mr. Fraiman: He was properly arrested, we concede that, your Honor."

Counsel further made it plain that the arrest warrant whose validity he was conceding was "one of these Immigration warrants which is obtained without any background material at all." Affirmative acceptance of what is now sought to be questioned could not be plainer.

The present form of the legislation giving authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment, is § 242 (a) of the Immigration and Nationality Act of 1952. (8 U. S. C. § 1252 (a)). The regulations under this Act delegate the authority to issue these administrative warrants to the District Directors of the I. N. S. "[a]t the commencement of any proceeding [to deport] . . . or at any time thereafter . . . whenever, in [their] . . . discretion, it appears that the arrest of the respondent is necessary or desirable." 8 CFR § 242.2 (a). Also, according to these regulations, proceedings to deport are commenced by orders to show cause issued by the District Directors or others; and the "Operating Instructions" of the I. N. S. direct that the application for an order to show cause should be based upon a showing of a prima facie case of deportability. The warrant of arrest for petitioner was issued by the New York District Director of the I. N. S. at the same time as he signed an order to show cause. Schoenenberger testified that, before the warrant and order were issued, he and Kanzler related to the District Director what they had learned from the F. B. I. regarding petitioner's status as an alien, and the order to show cause recited that petitioner had failed to register, as aliens must. Since petitioner was a suspected spy, who had never acknowledged his residence in the United States to the Government or openly admitted his presence here, there was ample reason to believe that his arrest pending deportation was "necessary or desirable." The arrest procedure followed

in the present case fully complied with the statute and regulations.

Statutes providing for deportation have ordinarily authorized the arrest of deportable aliens by order of an executive official. The first of these was in 1798. Act of June 25, 1798, c. 58, § 2, 1 Stat. 571. And see, since that time, and before the present Act, Act of Oct. 19, 1888, c. 1210, 25 Stat. 566; Act of Mar. 3, 1903, c. 1012, § 21, 32 Stat. 1218; Act of Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904; Act of Feb. 5, 1917, c. 29, § 19, 39 Stat. 889; Act of Oct. 16, 1918, c. 186, § 2, 40 Stat. 1012; Act of May 10, 1920, c. 174, 41 Stat. 593; Internal Security Act of 1950, c. 1024, Title I, § 22, 64 Stat. 1008. To be sure, some of these statutes, namely the Acts of 1888, 1903 and 1907, dealt only with aliens who had landed illegally in the United States, and not with aliens sought to be deported by reason of some act or failure to act since entering. Even apart from these, there remains overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens such as petitioner.

The constitutional validity of this long-standing administrative arrest procedure in deportation cases has never been directly challenged in reported litigation. Two lower court cases involved oblique challenges, which were summarily rejected. *Podolski v. Baird*, 94 F. Supp. 294; *Ex parte Avakian*, 188 F. 688, 692. See also the discussion in *Colyer v. Skeffington*, 265 F. 17, reversed on other grounds *sub nom. Skeffington v. Katzeff*, 277 F. 129, where the District Court made an exhaustive examination of the fairness of a group of deportation proceedings initiated by administrative arrests, but nowhere brought into question the validity of the administrative arrest procedure as such. This Court seems never expressly to have directed its attention to the particular question of the constitutional validity of administrative deportation warrants. It has

frequently, however, upheld administrative deportation proceedings shown by the Court's opinion to have been begun by arrests pursuant to such warrants. See *The Japanese Immigrant Case*, 189 U. S. 86; *Zakonaite v. Wolf*, 226 U. S. 272; *Bilokumsky v. Tod*, 263 U. S. 149; *Carlson v. Landon*, 342 U. S. 524. In *Carlson v. Landon*, the validity of the arrest was necessarily implicated, for the Court there sustained discretion in the Attorney General to deny bail to alien Communists held pending deportation on administrative arrest warrants. In the presence of this impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation, petitioner's disavowal of the issue below calls for no further consideration.

III.

Since petitioner's arrest was valid, we reach the question whether the seven challenged items, all seized during searches which were a direct consequence of that arrest, were properly admitted into evidence. This issue raises three questions: (1) Were the searches which produced these items proper searches for the Government to have made? If they were not, then whatever the nature of the seized articles, and however proper it would have been to seize them during a valid search, they should have been suppressed as the fruits of activity in violation of the Fourth Amendment. *E. g.*, *Weeks v. United States*, 232 U. S. 383, 393. (2) Were the articles seized properly subject to seizure, even during a lawful search? We have held in this regard that not every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, *Gouled v. United States*, 255 U. S. 298.

310, nor may the Government seize, wholesale, the contents of a house it might have searched, *Kremen v. United States*, 353 U. S. 346. (3) Was the Government free to use the articles, even if properly seized, as evidence in a criminal case, the seizures having been made in the course of a separate administrative proceeding?

The most fundamental of the issues involved concerns the legality of the search and seizures made in petitioner's room in the Hotel Latham. The ground of objection is that a search may not be conducted as an incident to a lawful administrative arrest.

We take as a starting point the cases in this Court dealing with the extent of the search which may properly be made without a warrant following a lawful arrest for crime. The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare *Marron v. United States*, 275 U. S. 192, with *Go-Bart Co. v. United States*, 282 U. S. 344, and *United States v. Lefkowitz*, 285 U. S. 452; compare *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris v. United States*, 331 U. S. 145, and *United States v. Rabinowitz*, 339 U. S. 56; compare also *Harris*, *supra*, with *Trupiano v. United States*, 334 U. S. 699, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial; and the petitioner himself accepted the *Harris* case on the motion to suppress, nor does he ask this Court to reconsider *Harris* and *Rabinowitz*. It would, under these circumstances, be unjustifiable retro-

spective lawmaking for the Court in this case to reject the authority of these decisions.

Are there to be permitted incidental to valid administrative arrests, searches as broad in physical area as, and analogous in purpose to, those permitted by the applicable precedents as incidents to lawful arrests for crime? Specifically, were the officers of the I. N. S. acting lawfully in this case when, after his arrest, they searched through petitioner's belongings in his hotel room looking for weapons and documents to evidence his "alienage"? There can be no doubt that a search for weapons has as much justification here as it does in the case of an arrest for crime, where it has been recognized as proper. *E. g.*, *Agnello v. United States*, 269 U. S. 20, 30. It is no less important for government officers, acting under established procedure to effect a deportation arrest rather than one for crime, to protect themselves and to insure that their prisoner retains no means by which to accomplish an escape.

Nor is there any constitutional reason to limit the search for materials proving the deportability of an alien, when validly arrested, more severely than we limit the search for materials probative of crime when a valid criminal arrest is made. The need for the proof is as great in one case as in the other, for deportation can be accomplished only after a hearing at which deportability is established. Since a deportation arrest warrant is not a judicial warrant, a search incidental to a deportation arrest is without the authority of a judge or commissioner. But so is a search incidental to a criminal arrest made upon probable cause without a warrant, and under *Rabinowitz*, 339 U. S., at 56, 60, such a search does not require a judicial warrant for its validity. It is to be remembered that an I. N. S. officer may not arrest and search on his own. Application for a warrant must be made to

an independent responsible officer, the District Director of the I. N. S., to whom a prima facie case of deportability must be shown. The differences between the procedural protections governing criminal and deportation arrests are not of a quality or magnitude to warrant the deduction of a constitutional difference regarding the right of incidental search. If anything, we ought to be more vigilant, not less, to protect individuals and their property from warrantless searches made for the purpose of turning up proof to convict than we are to protect them from searches for matter bearing on deportability. According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, not the least, restraint upon the Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed. We conclude, therefore, that government officers who effect a deportation arrest have a right of incidental search analogous to the search permitted criminal law-enforcement officers.

Judged by the prevailing doctrine, the search of petitioner's hotel room was justified. Its physical scope, being confined to the petitioner's room and the adjoining bathroom, was far less extensive than the search in *Harris*. The search here was less intensive than were the deliberately exhaustive quests in *Harris* and *Rabinowitz*, and its purpose not less justifiable. The only things sought here, in addition to weapons, were documents connected with petitioner's status as an alien. These may well be considered as instruments or means for accomplishing his illegal status, and thus proper objects of search under *Harris*, *supra*, 331 U. S., at 154.

Two of the challenged items were seized during this search of petitioner's property at his hotel room. The first was item (2), a forged New York birth certificate

for "Martin Collins," one of the false identities which petitioner assumed in this country in order to keep his presence here undetected. This item was seizable when come upon during a proper search, not only as a forged official document by which petitioner sought to evade his obligation to register as an alien, but also as a document which petitioner was using as an aid in the commission of espionage, for his undetected presence in this country was vital to his work as a spy. Documents used as a means to commit crime are the proper subjects of search warrants. *Gouled v. United States*, 255 U. S. 298, and are seizable when discovered in the course of a lawful search, *Marron v. United States*, 275 U. S. 192.

The other item seized in the course of the search of petitioner's hotel room was item (1), a piece of graph paper containing a coded message. This was seized by Schoenenberger as petitioner, while packing his suitcase, was seeking to hide it in his sleeve. An arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers that a weapon will be concealed, or that relevant evidence will be destroyed. Once this piece of graph paper came into Schoenenberger's hands, it was not necessary for him to return it, as it was an instrumentality for the commission of espionage. This is so even though Schoenenberger was not only not looking for items connected with espionage but could not properly have been searching for the purpose of finding such items. When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for. See *Harris, supra*, 331 U. S., at 154-155.

Items (3), (4), and (5), a birth certificate for "Emil Goldfus" who died in 1903, a certificate of vaccination for "Martin Collins," and a bank book for "Emil Goldfus"

were seized, not in petitioner's hotel room, but in a more careful search at I. N. S. headquarters of the belongings petitioner chose to take with him when arrested. This search was a proper one. The property taken by petitioner to I. N. S. headquarters was all property which, under *Harris*, was subject to search at the place of arrest. We do not think it significantly different, when the accused decides to take the property with him, for the search of it to occur instead at the first place of detention when the accused arrives there, especially as the search of property carried by an accused to the place of detention has additional justifications similar to those which justify a search of the person of one who is arrested. It is to be noted that this is not a case, like *Kremen v. United States, supra*, 353 U. S. 346, where the entire contents of the place where the arrest was made were seized. Such a mass seizure is illegal. The Government here did not seize the contents of petitioner's hotel room. Petitioner took with him only what he wished. He chose to leave some things behind in his room, which he voluntarily relinquished. And items (3), (4), and (5) were articles subject to seizure when come across during a lawful search. They were all capable of being used to establish and maintain a false identity for petitioner, just as the forged "Martin Collins" birth certificate, and were seizable for the same reasons.

Items (1)-(5) having come into the Government's possession through lawful searches and seizures connected with an arrest pending deportation, was the Government free to use them as evidence in a criminal prosecution to which they related? We hold that it was. Good reason must be shown for prohibiting the Government from using relevant, otherwise admissible, evidence. There is excellent reason for disallowing its use in the case of evidence, though relevant, which is seized by the Government in violation of the Fourth Amendment to the Constitution: "If letters and private documents can thus

be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Weeks v. United States*, 232 U. S. 383, 393.

These considerations are here absent, since items (1)-(5) were seized as a consequence of wholly lawful conduct. That being so, we can see no rational basis for excluding these relevant items from trial: no wrongdoing police officer would thereby be indirectly condemned, for there were no such wrongdoers; the Fourth Amendment would not thereby be enforced, for no illegal search or seizure was made; the Court would be lending its aid to no lawless government action, for none occurred. Of course cooperation between the branch of the Department of Justice dealing with criminal law enforcement and the branch dealing with the immigration laws would be less effective if evidence lawfully seized by the one could not be used by the other. Only to the extent that it would be to the public interest to deter and prevent such cooperation, would an exclusionary rule in a case like the present be desirable. Surely no consideration of civil liberties commends discouragement of such cooperation between these two branches when undertaken in good faith. When undertaken in bad faith to avoid constitutional restraints upon criminal law enforcement the evidence must be suppressed. That is not, as we have seen, this case. Individual cases of bad faith cooperation should be dealt with by findings to that effect in the cases as they arise, not by an exclusionary rule preventing effective cooperation when undertaken in entirely good faith.

We have left to the last the admissibility of items (6) and (7), the hollowed-out pencil and the block of wood containing a "cipher pad," because their admissibility is

founded upon an entirely different set of considerations. These two items were found by an agent of the F. B. I. in the course of a search he undertook of petitioner's hotel room, immediately after petitioner had paid his bill and vacated the room. They were found in the room's wastepaper basket, where petitioner had put them while packing his belongings and preparing to leave. No pretense is made that this search by the F. B. I. was for any purpose other than to gather evidence of crime, that is, evidence of petitioner's espionage. As such, however, it was entirely lawful, although undertaken without a warrant. This is so for the reason that at the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia*. There can be nothing unlawful in the Government's appropriation of such abandoned property. The two items which were eventually introduced in evidence were assertedly means for the commission of espionage, and were themselves seizable as such. These two items having been lawfully seized by the Government in connection with an investigation of crime, we encounter no basis for discussing further their admissibility as evidence.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1959.

Rudolph Ivanovich Abel, also
known as "Mark" and also
known as Martin Collins and
Emil R. Goldfus, Petitioner.
v.
United States of America.

On Writ of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[March 28, 1960.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK
concurring, dissenting.

Cases of notorious criminals—like cases of small, miserable ones—are apt to make bad law. When guilt permeates a record, even judges sometimes relax and let the police take shortcuts not sanctioned by constitutional procedures. That practice, in certain periods of our history and in certain courts, has lowered our standards of law administration. The harm in the given case may seem excusable. But the practices generated by the precedent have far-reaching consequences that are harmful and injurious beyond measurement. The present decision is an excellent example.

The opening wedge that broadened the power of administrative officers—as distinguished from police—to enter and search peoples' homes was *Frank v. Maryland*, 359 U. S. 360. That case allowed a health inspector to enter a home without a warrant, even though he had ample time to get one. The officials of the Immigration and Naturalization Service (I. N. S.) are now added to the preferred list. They are preferred because their duties, being strictly administrative, put them in a separate category from those who enforce the criminal law. They need not go to magistrates, the Court says, for warrants of

arrest. Their warrants are issued within the hierarchy of the agency itself.¹ Yet as I attempted to show in my dissent in the *Frank* case, the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws. 359 U. S. 376-379.

Moreover, the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant. We need not go far to find examples. In *Maryland v. Pettiford*, Sup. Bench Balt. City, The Daily Record, Dec. 16, 1959, the police used the mask of a health inspector to make the *Frank* case serve as an easy way to get a search without a warrant. Happily, they were rebuked.²

¹ Section 242 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U. S. C. § 1252 (a), provides "Pending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody."

² In the *Pettiford* case it appears that a police officer assigned to the Sanitation Division gained entrance into a home without a warrant and discovered that the defendant who occupied the premises was engaged in lottery activities. He then signaled to a policeman in charge of gambling activities who was waiting outside in accordance with a prior agreement. Lottery slips were seized and over the defendant's objection were received in evidence in a criminal trial. A motion for a new trial was granted. The Supreme Bench of Baltimore City said in its opinion:

"Section 120 of Article 12 of the Baltimore City Code provides that if the Commission of Health has cause to suspect that a nuisance exists in any home, he may demand entry therein in the daytime and the owner or occupier is subject to a fine if entry is denied. A conviction under this Section by the Criminal Court of Baltimore City was sustained by the Supreme Court of the United States in a five to four decision. *Frank v. Maryland* [359 U. S. 360]. . . .

"In this case, it is evident that a principal, if not the chief purpose of the entry of the police officer assigned to the sanitation division was to endeavor to secure evidence of a lottery violation for his colleague. 'The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society.' *Wolf v. Colorado*, 338

But that case shows the kind of problems the *Frank* doctrine generates. The present case is another example of the same kind, although here the police are not rebuked. The administrative official with an administrative warrant, over which no judicial official exercises any supervision and which by statute may be used only for deportation, performs a new role. The police wear his mask to do police work. That, in my view, may not be done, even though we assume that the administrative warrant issued by an administrative rather than a judicial officer is valid for an arrest for the purpose of deportation. We take liberties with an Act of Congress, as well as the Constitution, when we permit this to be done. The statute permits the arrest of an alien on an administrative warrant. "[p]ending a determination of deportability."³ The Court now reads the Act as if it read "Pending an investigation of criminal conduct." Such was the nature of the arrest.

With due deference to the two lower courts, I think the record plainly shows that the F. B. I. were the moving force behind this arrest and search. For at least a month the F. B. I. investigated the espionage activities of petitioner. They were tipped off concerning this man and his role in May; the arrest and search were made on June 21. The F. B. I. had plenty of time to get a search warrant, as much if not more time than they had in *Johnson v. United States*, 333 U. S. 10, and *Kremen v. United States*, 353 U. S. 346, where the Court held warrantless searches illegal. But the F. B. I. did not go to a magistrate for a search warrant. They went instead to the

U. S. 25, 27. An exception to that security, upheld because indispensable for the maintenance of the community health, is not to be used to cover searches without warrants inconsistent with the conceptions of human rights embodied in our State and Federal Constitutions."

³ Note 1, *supra*.

I. N. S. and briefed the officials of that agency on what they had discovered. On the basis of this data a report was made to John Murff, Acting District Director of the I. N. S., who issued the warrant of arrest.

No effort was made by the F. B. I. to obtain a search warrant from any judicial officer, though, as I said, there was plenty of time for such an application. The administrative warrant of arrest was chosen with care and calculation as the vehicle through which the arrest and search were to be made. The F. B. I. had an agreement with the officials of I. N. S. that this warrant of arrest would not be served at least until petitioner refused to "cooperate." The F. B. I. went with agents of the I. N. S. to apprehend petitioner in his hotel room. Again, it was the F. B. I. who were first. They were the ones who entered petitioner's room and who interrogated him to see if he would "cooperate"; and when they were unable to get him to "cooperate" by threatening him with arrest, they signaled agents of the I. N. S. who had waited outside to come in and make the arrest. The search was made both by the F. B. I. and by officers of the I. N. S. And when petitioner was flown 1,000 miles to a special detention camp and held for three weeks, the F. B. I. as well as I. N. S. interrogated him.*

Thus the F. B. I. used an administrative warrant to make an arrest for criminal investigation both in violation of § 242 (a) of the Immigration and Nationality Act⁵ and in violation of the Bill of Rights.

The issue is not whether the F. B. I. were in bad faith. Of course they were not. The question is how far zeal

* Immigration officials (who often claim that their actions have an administrative finality beyond the reach of courts, see *Ludecke v. Watkins*, 335 U. S. 160; *Jay v. Boyd*, 351 U. S. 345) have no authority to detain suspects for secret interrogation. See *United States v. Minker*, 350 U. S. 179.

⁵ Note 1, *supra*.

may be permitted to carry officials bent on law enforcement. As Mr. Justice Brandeis once said, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U. S. 438, 479 (dissenting opinion). The facts seem to me clearly to establish that the F. B. I. wore the mask of I. N. S. to do what otherwise they could not have done. They did what they could do only if they had gone to a judicial officer pursuant to the requirements of the Fourth Amendment, disclosed their evidence, and obtained the necessary warrant for the searches which they made.

If the F. B. I. had gone to a magistrate, any search warrant issued would by terms of the Fourth Amendment have to "particularly" describe "the place to be searched" and the "things to be seized." How much more convenient it is for the police to find a way around those specific requirements of the Fourth Amendment! What a hindrance it is to work laboriously through constitutional procedures! How much easier to go to another official in the same department! The administrative officer can give a warrant good for unlimited search. No more showing of probable cause to a magistrate! No more limitations on what may be searched and when!

In *Rea v. United States*, 350 U. S. 214, federal police officers, who obtained evidence in violation of federal law governing searches and seizures and so lost their case in the federal court, repaired to a state court and proposed to use it there in a state criminal prosecution. The Court held that the Federal District Court could properly enjoin the federal official from using the illegal search and seizure as basis for testifying in the state court. The federal rules governing searches and seizures, we held, are "designed as standards for federal agents" no more to be defeated by devious than by direct methods. The present case is even more palpably vulnerable. No state agency

is involved. Federal police seek to do what immigration officials can do to deport a person but what our rules, statutes, and Constitution forbid the police from doing to prosecute him for a crime.

The tragedy in our approval of these short cuts is that the protection afforded by the Fourth Amendment is removed from an important segment of our life. We today forget what the Court said in *Johnson v. United States, supra*, at 14, that the Fourth Amendment provision for "probable cause" requires that those inferences "be drawn by a neutral and detached magistrate" not "by the officer engaged in the often competitive enterprise of ferreting out crime." This is a protection given not only citizens but to aliens as well, as the opinion of the Court by implication holds. The right "of the people" covered by the Fourth Amendment certainly gives security to aliens in the same degree that "person" in the Fifth and "the accused" in the Sixth Amendments also protects them. See *Wong Wing v. United States*; 163 U. S. 228, 242. Here the F. B. I. works exclusively through an administrative agency—the I. N. S.—to accomplish what the Fourth Amendment says can be done only by a judicial officer. A procedure designed to serve administrative ends—deportation—is cleverly adapted to serve other ends—criminal prosecution. We have had like examples of this same trend in recent times. Lifting the requirements of the Fourth Amendment for the benefit of health inspectors was accomplished by *Frank v. Maryland*, as I have said. Allowing the Department of Justice rather than judicial officers to determine whether aliens will be entitled to release on bail pending deportation hearings is another. See *Carlson v. Landon*, 342 U. S. 524.

Some things in our protective scheme of civil rights are entrusted to the judiciary. Those controls are not always congenial to the police. Yet if we are to preserve our system of checks and balances and keep the police

from being all-powerful, these judicial controls should be meticulously respected. When we read them out of the Bill of Rights by allowing shortcuts as we do today and as the Court did in the *Frank* and *Carlson* cases, police and administrative officials in the Executive Branch acquire powers incompatible with the Bill of Rights.

The F. B. I. stalked petitioner for weeks and had plenty of time to obtain judicial warrants for searching the premises he occupied. I would require them to adhere to the command of the Fourth Amendment and not evade it by the simple device of wearing the masks of immigration officials while in fact they are preparing a case for criminal prosecution.

SUPREME COURT OF THE UNITED STATES

No. 2.—OCTOBER TERM, 1959.

Rudolf Ivanovich Abel, also known as "Mark" and also known as Martin Collins and Emil R. Goldfus, Petitioner. v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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[March 28, 1960.]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

This is a notorious case, with a notorious defendant. Yet we must take care to enforce the Constitution without regard to the nature of the crime or the nature of the criminal. The Fourth Amendment protects "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." This right is a basic one of all the people, without exception; and this Court ruled in *Weeks v. United States*, 232 U. S. 383, that the fruits of governmental violation of this guarantee could not be used in a criminal prosecution. The Amendment's protection is thus made effective for everyone only by upholding it when invoked by the worst of men.

The opinion of the Court makes it plain that the seizure of certain of the items of petitioner taken from his room at the Hotel Latham and used in evidence against him must depend upon the existence of a broad power, without a warrant, to search the premises of one arrested, in connection with and "incidental" to his arrest. This power is of the sort recognized by *Harris v. United States*, 331 U. S. 145, and later asserted even where the arresting officers, as here, had ample time and opportunity to secure

a search warrant. *United States v. Rabinowitz*, 339 U. S. 56, overruling *Trupiano v. United States*, 334 U. S. 699. The leading early cases do not recognize any such power to make a search generally through premises attendant upon an arrest.* See *Go-Bart Importing Co. v. United States*, 282 U. S. 344; *United States v. Lefkowitz*, 285 U. S. 452.¹

The general question has been extensively canvassed here, in the general context of an arrest for crime, in the *Harris*, *Trupiano* and *Rabinowitz* cases. Whether *Harris* and *Rabinowitz* should now be followed on their own facts is a question with which the Court is not now faced. Rather the question is whether the doctrine of those cases should be extended to a new and different set of facts—facts which present a search made under circumstances much less consistent with the Fourth Amendment's prohibition against unreasonable searches than any which this Court has hitherto approved. Factual differences weigh heavily in this area: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co. v. United States*, *supra*, at 357. In *Harris* and *Rabinowitz*, the broad search was performed as an incident to an arrest for crime under warrants lawfully issued. 331 U. S., at 148; 339 U. S., at 58. The issuance of these warrants is by no means automatic—it is controlled by a constitutionally prescribed standard. It thus could be held that sufficient protection was given the individual without the execution of a second warrant, for the search. Cf. Clark, J., dissenting in *United States v. Rabinowitz*, 176 F. 2d 732, 736, reversed, 339 U. S. 56. And while a search generally through premises "incident"

¹ Earlier expressions looking the other way, *Agnello v. United States*, 269 U. S. 20, 30; *Marron v. United States*, 275 U. S. 192, 198-199, were put in proper perspective by their author in *Go-Bart* and *Lefkowitz*. See 282 U. S., at 358; 285 U. S., at 465.

to an arrest for crime without a warrant has been sanctioned only inferentially here,² even if such a search be deemed permissible under the Fourth Amendment, it would not go so far as the result here. Such an arrest may constitutionally be made only upon probable cause, the existence of which is subject to judicial examination, see *Henry v. United States*, 361 U. S. 98, 100; and such an arrest demands the prompt bringing of the person arrested before a judicial officer, where the existence of probable cause is to be inquired into. Fed. Rules Crim. Proc., 5 (a), 5 (c). This Court has been astute to fashion methods of ensuring the due observance of these safeguards. *Henry v. United States*, *supra*; *Mallory v. United States*, 354 U. S. 449; *McNabb v. United States*, 318 U. S. 332.

Even assuming that the power of Congress over aliens may be as great as was said in *Galvan v. Press*, 347 U. S. 522, and that deportation may be styled "civil," *Harisiades v. Shaughnessy*, 342 U. S. 580, 594, it does not follow that Congress may strip aliens of the protections of the Fourth Amendment and authorize unreasonable searches of their premises, books and papers. Even if Congress could make the exclusionary sanction of the Amendment inapplicable in deportation proceedings, the fruits of the search here were used in a prosecution whose criminal character no dialectic can conceal. Clearly the consequence of the Fourth Amendment in such a trial is that the fruits of such a search may not be given in evidence, under the rule declared in *Weeks v. United States*, *supra*. We need not, in my view, inquire as to whether the sort of "administrative" arrest made here is constitutionally valid as to permit the officers to hold petitioner's person for deportation proceedings. With the Court, this issue may be treated as not properly before

² See *United States v. Rabinowitz*, *supra*, at 60.

us for our consideration, and the arrest may be treated for the purposes of this case as lawful in itself. But even with *Harris* and *Rabinowitz*, that does not conclude the matter as to the search. It is patent that the sort of search permitted by those cases, and necessary to sustain the seizures here, goes beyond what is reasonably related to the mechanics of the arrest itself—ensuring the safety of the arresting officers and the security of the arrest against the prisoner's escape. Since it does, I think it plain that before it can be concluded here that the search was not an unreasonable one, there must be some inquiry into the over-all protection given the individual by the totality of the processes necessary to the arrest and the seizure. Here the arrest, while had on what is called a warrant, was made totally without the intervention of an independent magistrate; it was made on the authorization of one administrative official to another. And after the petitioner was taken into custody, there was no obligation upon the administrative officials who arrested him to take him before any independent officer, sitting under the conditions of publicity that characterize our judicial institutions, and justify what had been done.³ Concretely, what happened instead was this: petitioner, upon his arrest, was taken to a local administrative headquarters and then flown in a special aircraft to a special detention camp over 1,000 miles away. He was incarcerated in solitary confinement there. As far as the world knew, he had vanished. He was questioned daily at the place of incarceration for over three weeks. An executive procedure as to his deportability was had, at the camp, after a few days, but there was never any independent inquiry or judicial control over the circumstances of the arrest and the seizure till over five weeks after his arrest.

³ This procedure is statutorily based on § 242 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 208, 8 U. S. C. § 1252 (a).

when, at the detention camp, he was served with a bench warrant for his arrest on criminal charges, upon an indictment.

The Fourth Amendment imposes substantive standards for searches and seizures; but with them one of the important safeguards it establishes is a procedure; and central to this procedure is an independent control over the actions of officers effecting searches of private premises. "Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests." *United States v. Lefkowitz*, *supra*, at 464. "Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald v. United States*, 335 U. S. 451, 455. It is one thing to say that an adequate substitute for this sort of intervention by a magistrate can be found in the strict protections with which federal criminal procedure surrounds the making of a criminal arrest—where the action of the officers must receive an antecedent or immediately subsequent independent scrutiny. It goes much further to say that such a substitute can be found in the executive processes employed here. The question is not whether they are constitutionally adequate in their own terms—whether they are a proper means of taking into custody one not charged with crime. The question is rather whether they furnish a context in which a search generally through premises can be said to be a reasonable one under the Fourth Amendment. These arrest procedures, as exemplified here, differ as night from day from the processes of an arrest for crime. When the power to make a broad, warrantless search is added to them, we create a complete concentration of power in executive officers over the person and effects of the individual. We completely

remove any independent control over the powers of executive officers to make searches. They may take any man they think to be a deportable alien into their own custody, hold him without arraignment or bond, and, having been careful to apprehend him at home, make a search generally through his premises. I cannot see how this can be said to be consistent with the Fourth Amendment's command; it was, rather, against such a concentration of executive power over the privacy of the individual that the Fourth Amendment was raised. I do not think the *Harris* and *Rabinowitz* cases have taken us to this point.

If the search here were of the sort the Fourth Amendment contemplated, there would be no need for the elaborate, if somewhat pointless, inquiry the Court makes into the "good faith" of the arrest. Once it is established that a simple executive arrest of one as a deportable alien gives the arresting officers the power to search his premises, what precise state of mind on the part of the officers will make the arrest a "subterfuge" for the start of criminal proceedings, and render the search unreasonable? We are not, I fear, given any workable answer, and of course the practical problems relative to the trial of such a matter hardly need elaboration; but the Court verbalizes the issue as "whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." But under today's ruling, every administrative arrest offers this possibility of a facile search, theoretically for things connected with unlawful presence in the country, that may turn up evidence of crime; and this possibility will be well known to arresting officers. Perhaps the question is how much basis the officers had to suspect the person of crime; but it would appear a strange test as to whether a search which turns up criminal evidence is unreasonable, that the search is

the more justifiable the less there was antecedent probable cause to suspect the defendant of crime. If the search were made on a valid warrant, there would be no such issue even if it turned up matter relevant to another crime. See *Gouled v. United States*, 255 U. S. 298, 311-312. External procedural control in accord with the basic demands of the Fourth Amendment removes the grounds for abuse; but the Court's attitude here must be based on a recognition of the great possibilities of abuse its decision leaves in the present situation. These possibilities have been recognized before, in a case posing less danger: "Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country. . . . The progress is too easy from police action unscrutinized by judicial authorization to the police state," *United States v. Rabinowitz, supra*, at 82 (dissenting opinion). Where a species of arrest is available that is subject to no judicial control, the possibilities become more and more serious. The remedy is not to invite fruitless litigation into the purity of official motives, or the specific direction of official purposes. One may always assume that the officers are zealous to perform their duty. The remedy is rather to recognize that the power to perform a search generally throughout premises upon a purely executive arrest is so unconfined by any safeguards that it cannot be countenanced as consistent with the Fourth Amendment.

One more word. We are told that the governmental power to make a warrantless search might be greater where the object of the search is not related to crime but to some other "civil" proceeding—such as matter bearing on the issue whether a man should forcibly be sent from the country. The distinction is rather hollow here, where the proofs that turn up are in fact given in evidence in a criminal prosecution. And the distinction, again, invites

a trial of the officers' purposes. But in any event, I think it 'perverts the Amendment to make this distinction. . . The Amendment states its own purpose, the protection of the privacy of the individual and of his property against the incursions of officials: the "right of the people to be secure in their persons, houses, papers, and effects." See *Boyd v. United States*, 116 U. S. 616, 627. Like most of the Bill of Rights it was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure it must be upheld when asserted by criminals, in order that it may be at all effective, but it "reaches all alike, whether accused of crime or not." *Weeks v. United States*, *supra*, at 392. It is the individual's interest in privacy which the Amendment protects, and that would not appear to fluctuate with the "intent" of the invading officers. It is true that the greatest and most effective preventive against unlawful searches that has been devised is the exclusion of their fruits from criminal evidence, see *Weeks v. United States*, *supra*; *Boyd v. United States*, *supra*; but it is strange reasoning to infer from this that the central thrust of the guarantee is to protect against a search for such evidence. The argument that it is seems no more convincing to me now than when it was made by the Court in *Frank v. Maryland*, 359 U. S. 360. To be sure, the Court in *Boyd v. United States*, *supra*, and in subsequent cases⁴ has commented upon the intimate relationship between the privilege against unlawful searches and seizures and that against self-incrimination. This has been said to be erroneous history;⁵ if it was, it

⁴ See, e. g., *Gouled v. United States*, *supra*, at 306; *United States v. Lefkowitz*, *supra*, at 466-467. The *Weeks* case itself, though drawing great support from *Boyd*, appears to rest most heavily on the Fourth Amendment itself.

⁵ The famous attack on the *Boyd* case's historical basis is, of course, to be found in 8 Wigmore, *Evidence* (3d ed. 1940), §§ 2184, 2264. The attack is incident to Wigmore's strictures on the exclusionary rule. *Id.*, §§ 2183-2184.

was even less than a harmless error; it was part of the process through which the Fourth Amendment, by means of the exclusionary rule, has become more than a dead letter in the federal courts. Certainly this putative relationship between the guarantees is not to be used as a basis of a stinting construction of either—it was the *Boyd* case itself* which set what might have been hoped to be the spirit of later construction of these Amendments by declaring that the start of abuse can “only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.” 116 U. S., at 635.

Since evidence was introduced against petitioner which had been obtained in violation of his constitutional guarantees as embodied in the Fourth Amendment, I would reverse his conviction for a new trial on the evidence not subject to this objection.

* It is not without interest to note, too, that the *Boyd* case itself involved a search not in connection with a prosecution to impose fine or imprisonment, but simply with an action to forfeit 35 cases of plate glass said to have been imported into the country under a false customs declaration.